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No. 80-1681

In the
Supreme Court of the United States
October Term, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.,
Appellants.

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,
Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

APPENDIX OF UNREPORTED DECISIONS

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TABLE OF CONTENTS

PAGE

Eucalyptus Records and Tapes Northwest, Inc., et al. v. James, et al., No. C-81-402-RJM (E.D. Wash. July 21, 1981) 1a

General Stores, Inc. v. City of Albuquerque, No. 81-0027-M (D.N.M. March 23, 1981) 5a

Hejira Corp., et al. v MacFarlane, et al., No. 80-2062 (10th Cir. May 5, 1981) 13a

Indiana Chapter (NORML) et al. v. Sendak, et al., No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) 37a

Lazy J., Ltd., et al. v. The Borough at State College, No. 80-1167 (M.D. Pa. Jan. 30, 1981) 65a

Smith, et al. v. Roark, et al., No. 80-2110 (S.D. W. Va., May 13, 1980) 77a

The Town Tobacconist, et al. v. Degnan, No. C-2198-80 Super. Ct. N.J., March 12, 1981) 93a

Wakabayashi v. Tooley, No. 81 CU 6293 (Dist. Ct., City and Co. of Denver, Co. decided August 18, 1981) 103a

APPENDIX

UNITED STATES DISTRICT COURT

Eastern District Of Washington

EUCALYPTUS RECORDS AND TAPES NORTHWEST, INC., et al.

Plaintiffs,

v.

CHARLES R. JAMES, et al.

Defendants.

No. C-81-402-RJM

Filed in U.S. District Court,
Eastern District of Washington
Jul. 21, 1981
J. R. Fall Quist, Clerk

ORDER

Plaintiffs have moved for a preliminary injunction prohibiting the enforcement of the provisions contained in Washington Laws of 1981, Chapter 48, to be codified at Chapter 69.50 of the Revised Code of Washington. I have concluded that the motion should be granted.

The law in question makes it a crime to use, or to knowingly deliver, or possess or manufacture with the intent to deliver, drug paraphernalia. The statute also contains a criminal penalty for the placing of advertisements promoting drug paraphernalia and civil forfeiture provisions. The language of the Washington statute was taken almost verbatim from the Model Drug Paraphernalia Act drafted by the Drug Enforcement Agency in 1979. Plaintiffs have challenged the statute on several constitutional grounds.

The test to be applied in determining whether a preliminary injunction should issue has been stated by the Ninth Circuit as follows:

> One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

Wm. Inglis & Sons Baking Co. v. *ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975).

Turning first to the matter of irreparable harm, I find that plaintiffs have made a strong showing of hardship should the statute be implemented prior to a final judicial determination of its validity. First, as evidenced by the affidavits submtited by plaintiffs, they face substantial business losses if they refrain from selling arguably proscribed items during the pendency of this case. Alternatively, if plaintiffs continue to do business pending a decision on the merits, they face the threat of criminal prosecution under a potentially invalid statute.

Further, the portion of the statute which prohibits the advertisement of the items proscribed has been alleged by plaintiffs to violate the First Amendment. As the Supreme Court has stated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Finally, defendants have not made a specified showing of what harm would result from a delay in enforcing the statute. The Court also notes in this regard the fact that the legislature opted not to enact the law as an emergency bill.

Given the existence of the serious potential hardship weighted toward plaintiffs, an injunction may be granted upon the minimal showing that "a serious question" exists as to the outcome on the merits. I find that plaintiffs have met this requirement. There have been numerous recent judicial decisions on the validity of various ordinances and statutes resembling the Model Drug Paraphernalia Act. It is not necessary to explore these various decisions at length; suffice it to say that in several of these decisions the courts have invalidated these

laws. *E.g., Record Revolution No. 6, Inc.* v. *City of Parma*, 638 F.2d 916 (6th Cir. 1980); *Weiler* v. *Carpenter*, 507 F. Supp. 837 (D.N.M. 1981); *Information Management Services, Inc.* v. *Borough of Pleasant Hills*, 512 F. Supp. 1066 (W.D. Pa. 1981); *General Stores, Inc.* v. *City of Albuquerque*, No. 81-0027-M Civil (D.N.M. March 23, 1981).

Under these circumstances, a preliminary injunction is justified. *See Florida Businessmen for Free Enterprise* v. *City of Hollywood*, No. 80-5769 (5th Cir. June 10, 1981). Accordingly,

IT IS ORDERED that defendants and their employees and agents are enjoined from enforcing the provisions of Washington Laws of 1981, Chapter 48, by arrest, prosecution, or seizure, pending further order of this Court.

At the hearing on plaintiff's motion, counsel for the State requested permission to further brief the questions relating to the Court's authority to delete objectionable portions of the statute. The parties should contact the Clerk of the Court within ten (10) days of the receipt of this Order and indicate whether a date should be set for either the filing of further briefs or the holding of an evidentiary hearing, or whether the matter will be submitted on the existing record. In making these decisions, counsel should consider whether the present record is adequate for purposes of appeal.

DONE THIS 21st DAY OF JULY, 1981.

/s/ Robert J. McNichols

Robert J. McNichols
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

For The District Of New Mexico

GENERAL STORES, INC., a New Mexico corporation, and MITCHELL FELDMAN,

Plaintiffs,

v.

CITY OF ALBUQUERQUE, a municipal corporation, and ELROY HANSEN,

Defendants.

No. 81-0027-M Civil

Filed at Albuquerque
Mar. 23, 1981
Jesse Casaus, Clerk

MEMORANDUM OPINION AND ORDER

This case is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. §1983. The plaintiffs are General Stores, Inc., a New Mexico corporation and its owner Mitchell Feldman. The defendants are the City of Albuquerque, a municipal corporation, and Elroy Hansen who is the Albuquerque Chief of Police. Plaintiffs have challenged the constitutionality of the Albuquerque Drug Paraphernalia Ordinance which went into effect in January 1981. Enforcement of the ordinance has been stayed pending my decision in this matter due to several stipulations entered into by the parties. Although such a stay exists, a case or controversy is present because there is a genuine threat of criminal prosecution of the plaintiffs under the ordinance that is being challenged. *Steffel* v. *Thompson,* 415 U.S. 452 (1974). Jurisdiction of this court is, therefore, proper pursuant to 28 U.S.C. §§1321, 1343, 2201 and 2202.

A hearing on plaintiffs' application for a preliminary injunction was held in this matter on March 6, 1981. Since that time, the parties have agreed that the trial on the merits is to be consolidated with that hearing pursuant to Rule 65 of the Federal Rules of Civil Procedure. The pleadings filed, the testimony taken at the hearing on the plaintiffs' application for a preliminary injunction, the exhibits admitted into evidence on that date and the memoranda of points and authorities submitted by the parties constitute the entire record before this Court.

Plaintiffs challenge the constitutionality of the ordinance by alleging that it is vague and overbroad and, therefore, a deprivation of the guarantee of due process found in the Fourteenth Amendment to the United States Constitution. They also allege that because the ordinance is aimed at a certain class of retailers, it violates the equal protection guarantees found in the United States Constitution. Plaintiffs further allege that the ordinance violates First Amendment rights and unlawfully interferes with interstate commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States. Plaintiffs have requested this Court to enjoin the defendants from enforcing the ordinance, to declare the ordinance violative of the First Amendment, Fourteenth Amendment, and the Commerce Clause of the United States Constitution, and to award the plaintiffs their reasonably incurred attorneys' fees pursuant to 42 U.S.C. §1988.

The ordinance being challenged in this action is an alteration of the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration of the United States Department of Justice. Other courts have found various provisions of the Model Act unconstitutional. *See e.g. Record Revolution No. 6, Inc.* v. *City of Parma*, ... F.2d ....., (6th Cir. 1980); *Weiler* v. *Carpenter*, No. 80-637-JB Civ., (D.N.M. Feb. 11, 1981). In response to these decisions, the Albuquerque City Council omitted some sections of the Model Act and revised other sec-

tions. These amendments illustrate a commendable attempt by the Albuquerque City Council to pass a constitutional ordinance. These attempts, however, are not sufficient to render the ordinance constitutional.

Plaintiffs initially argue that the ordinance is unconstitutionally vague, contrary to the Due Process Clause of the Fourteenth Amendment.

An ordinance is void for vagueness if its prohibitions are not clearly defined.

> Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnotes omitted). The Albuquerque Drug Paraphernalia Ordinance, which is set out at the end of this opinion, offends both values. It fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and it fails to provide explicit standards for those who must enforce the ordinance.

Although I believe the ordinance is vague in its entirety, I set out below several specific illustrations of its vagueness. By doing so, I do not mean to imply that the examples given are the only constitutional problems of the ordinance. I agree with many of the findings and conclusions of other courts with respect to various portions of the Model Act.

One section of the ordinance attempts to define drug paraphernalia and states that drug paraphernalia means, "all equipment, products and materials of any kind which are used, intended for use, or designed for use," in doing a variety of things with controlled substances. The ordinance fails to set out whose intent or whose use or whose design is applicable to this definition. The plaintiffs here are sellers of items which may fall under the definition of drug paraphernalia. They are concerned that they may be charged with a crime because of a purchaser's intent to use an item for illegal uses. In the cases involving challenges to similar ordinances by sellers of items which may be drug paraphernalia, the courts do not agree whether the intent of the seller or the intent of the purchaser is the relevant intent when the seller is the one charged with a drug paraphernalia crime. *Compare e.g. Weiler* v. *Carpenter*, No. 80-637-JB Civ. at 8 *with Florida Businessmen for Free Enterprise* v. *City of Hollywood*, No. 80-6157 Civ.-NCR (S.D. Fla. Aug. 29, 1980). I find that no matter whose intent is relevant, the statute is unconstitutionally vague. If it is the buyer's intent that is relevant, then the seller who is charged with a crime is charged with the knowledge of what a buyer's intent is. That does not give him a reasonable opportunity to know what the ordinance prohibits. If it is the seller's intent which is relevant then the policeman attempting to enforce the ordinance will have to divine the seller's intent. The ordinance, however, fails to provide explicit standards for the policeman to apply in divining the seller's intent.

Another portion of the ordinance attempts to define "designed for use". It states that that term shall mean "designed, made or modified with the specific intent that the item so designed, made or modified is to be used" in a variety of activities involving controlled substances. Once again, it is unclear whose intent is relevant in this definition. If it is the designer's intent that is relevant, then a storekeeper or a purchaser could be guilty of a violation of a drug paraphernalia law even though they

did not intend to use it or have it be used with drugs. He is saddled with an impossible task—knowing the designer's intent. Many of the items listed as possible items of drug paraphernalia are things used by people in ways not involving controlled substances and a storekeeper does not know the intent of all the designers of his merchandise. He, therefore, is unable to determine what he is allowed to deliver to his customers.

Another portion of the ordinance sets out relevant factors to be used in "determining whether an object is drug paraphernalia (by) a court or other authority." Although these factors are listed as relevant, no guide is given to a person reading the ordinance to determine the amount of importance each factor possesses. It is unclear how many of the relevant factors must be present, before an item will be considered drug paraphernalia. One factor is whether the owner is a legitimate supplier of like or related items in the community such as a licensed distributor or dealer of tobacco products. I have no idea what a legitimate supplier is, much less how this factor affects the other factors. Another factor listed is the "ratio of sales of the object(s) to the total sales of the business enterprise." No guideline is offered as to what kind of ratio is indicative of drug paraphernalia and what ratio would be indicative of non-drug paraphernalia.

The foregoing examples of the vagueness of the ordinance make it clear that a person of ordinary intelligence is not given a reasonable opportunity to know what is prohibited, so that he may act accordingly. Furthermore, the interplay of these various sections, impermissibly delegates basic policy matters to the police and the courts for determination of what constitutes drug paraphernalia. This could easily lead to the dangers of arbitrary and discriminatory application. For these reasons, I find the ordinance unconstitutionally vague.

The ordinance also suffers from the infirmity of overbreadth. The overbreadth doctrine prohibits a statute

from making innocent or constitutionally protected conduct criminal. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). In the violation section of the ordinance it states that it is unlawful "for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to" do various things with controlled substances. The ordinance also makes it a violation for

> any person to place in any newspaper, magazine, handbill or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

Even if one could determine what items were drug paraphernalia, the fact that the standard "reasonably should know" is used in defining the violation seems to make negligence the basis for a criminal charge. At the very least, the inclusion of that standard renders the provision vague. It seems that one may be charged and convicted of the crime without having had the specific intent to commit the crime.

A second overbreadth problem in the relevant factors is the potential arrest, prosecution, or conviction of a person on the impermissible theory of guilt by association. Statements by another, proximity of the object, in time and space, to a direct violation of drug laws are included as relevant factors. This means that the ordinance permits events beyond the control of the retail owner to determine his guilt. This may well make a person's innocent conduct subject to criminal prosecution. This is clearly overbreadth and, therefore unconstitutional.

The defendants have argued that if the Court found the ordinance to be ambiguous then abstention would be proper so that the state courts could have an oppor-

tunity to construe the ordinance in a constitutional manner. *Bellotti* v. *Baird*, 428 U.S. 132 (1976). I find that argument to be inapplicable to the present situation. The ordinance does not suffer from mere ambiguity; it suffers from total vagueness and overbreadth. Giving an opportunity to the state courts to construe the statute would be useless. It cannot be construed in a constitutional manner.

The plaintiffs have also claimed that the ordinance deprives them of the equal protection of the laws and that it is aimed specifically at plaintiffs and other similarly situated retailers but not at retailers whose places of business sell "paraphernalia" as small or incidental portions of the inventory. Because of my ruling on the due process claim of the plaintiffs, I shall decline to decide whether or not the equal protection guarantees of the plaintiffs have been violated. I do note, though, that that portion of the ordinance brought into question by plaintiff in their equal protection claim is clearly a factor of my finding a violation of due process guarantees as discussed above.

Plaintiffs have also challenged the ordinance on the basis that their First Amendment freedom of speech rights have been violated by enactment of the ordinance. This argument focuses on the violation section regarding advertisement. The amendments to the Model Act which were made by the Albuquerque City Council seem to have cured at least some of the First Amendment infirmities found by other courts with the original version of the Model Act. Because of the ordinance's unconstitutionality on other grounds, I will decline to make a determination as to whether or not it violates the First Amendment rights of the plaintiffs.

The plaintiffs' complaint also contained an allegation that the ordinance was in violation of the Commerce Clause of the United States Constitution. They have failed to address that issue in their various memoranda and arguments. They, therefore, have failed to sustain

their burden of proof on this issue and I shall find for defendant on this issue.

Plaintiffs have also requested that I award them their reasonably incurred attorneys' fees pursuant to 42 U.S.C. §1988. I find that they are a prevailing party and that such an award would be proper. *Gurule* v. *Wilson*, 635 F.2d 782 (10th Cir. 1980). Plaintiffs shall have ten days to submit their requested amount of attorneys' fees and defendants shall have five days from that submission to make any objections. Now, Therefore,

IT IS ORDERED that defendants be, and hereby are, enjoined from enforcing enactment of 2-1981 entitled "Ordinance Prohibiting the Manufacture and Delivery of Drug Paraphernalia; Prohibiting the Advertisement of Drug Paraphernalia; Establishing a Penalty for Violation; Amending the Criminal Code of the City of Albuquerque."

IT IS FURTHER ORDERED that a Declaratory Judgment shall be, and hereby is, entered that the ordinance described above is in violation of the Fourteenth Amendment to the United States Constitution, and is, therefore, declared unconstitutional.

IT IS FURTHER ORDERED that plaintiffs shall be awarded their reasonably incurred attorneys' fees in an amount to be determined at a later date.

IT IS FURTHER ORDERED that plaintiffs' claim pursuant to the Commerce Clause of the United States Constitution be, and hereby is, dismissed on the merits.

/s/ Edwin Mechum
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-2062

HEJIRA CORPORATION, et al.,

Plaintiffs-Appellees,

v.

J. D. MAC FARLANE, et al.,

Defendants-Appellants.

Appeal from the United States District Court
For the District of Colorado
(D. C. No. 80-F-824)

David K. Rees, Assistant Attorney General, Denver, Colorado (J. D. MacFarlane, Attorney General, Richard F. Hennessey, Deputy Attorney General, Mary J. Mullarkey, Solicitor General, J. Stephen Phillips, First Assistant Attorney General, Denver, Colorado, with him on the brief), for Defendants-Appellants.

Arthur M. Schwartz, Arthur M. Schwartz, P.C., Denver, Colorado (Bradley J. Reich, Arthur M. Schwartz, P.C., Denver, Colorado, with him on the brief), for Plaintiffs-Appellees.

Before SETH, MCWILLIAMS and DOYLE, *Circuit Judges.*

DOYLE, *Circuit Judge.*

This declaratory action was instituted by a number of dealers in drug paraphernalia. They sought a judgment declaring the Colorado Drug Paraphernalia Act invalid — in violation of the Constitution of the United States.

House Bill No. 1190 became law on or about July 1, 1980. Five days before this date (when House Bill No. 1190 was to become effective) the plaintiffs, all of whom are dealers in drug paraphernalia, brought suit in the

United States District Court for the District of Colorado, naming as defendants the Attorney General of the State of Colorado and certain district attorneys, sheriffs and police chiefs. The plaintiffs sought declaratory relief which would declare House Bill No. 1190 unconstitutional, and sought, in addition, injunctive relief which would restrain the enforcement of the Colorado Drug Paraphernalia Act.

On September 5, 1980, the trial court held that the definition of "drug paraphernalia," which was contained in the Act, was unconstitutionally vague, and based upon that conclusion the court granted the plaintiffs' request for injunctive relief. The court rejected the plaintiffs' other constitutional attacks. The defendants filed their notice of appeal within the time allowed under the law.

It is impossible to determine the validity of the Colorado Drug Paraphernalia Act by reference to any particular provision thereof, or anything less than the total Act. Hence, the text of this Act is appended to this opinion. Because various sections will be considered we shall describe these provisions.

The legislative provision which is contained in Section 12-22-501 finds and declares that the possession, sale, manufacture, delivery or advertisement of drug paraphernalia results in the legitimization and encouragement of the illegal use of controlled substances by making the drug culture more visible and enticing, and that the ready availability of drug paraphernalia tends to promote, suggest, or increase the public acceptability of the illegal use of controlled substances. It is further stated that the purposes of part 5 of the Act are to promote the public peace, health, safety and welfare by prohibiting possession, sale, manufacture, and delivery or advertisement of drug paraphernalia, and to deter the use of controlled substances by controlling the drug paraphernalia associated with their use.

Section 502 of the Act defines a controlled substance as being a narcotic drug, the same as defined in Section

301, or dangerous drug, as defined in Section 403, and also defines drug paraphernalia as any machine, instrument, tool, equipment or device which is primarily adapted, designed and intended for one or more of the following: to introduce into the human body any controlled substance under circumstances in violation of the laws of this state; to enhance the effect on the human body of any controlled substance under circumstances in violation of the laws of this state; to conceal any quantity of any controlled substance under circumstances in violation of the laws of this state; to test the strength, effectiveness or purity of any controlled substance under circumstances in violation of the laws of this state. The section sets forth eleven factors which the court may consider, in addition to other relevant factors, in determining whether an object is drug paraphernalia. Included are:

(1) statements by an owner or by anyone in control of the object concerning its use;

(2) the proximity of the object to controlled substances;

(3) existence of any residue of any controlled substances on the object;

(4) direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows intend to use the object to facilitate a violation of part 5.

(5) instructions, oral or written, provided with the object concerning its use;

(6) descriptive materials accompanying the object which explain or depict its use;

(7) national or local advertising concerning its use;

(8) the manner in which the object is displayed for sale;

(9) whether the owner or anyone in control of the object is a supplier of like or related items in

the community for legal purposes, such as the distributor or dealer of tobacco products;

(10) existence and scope of legal uses for the object in the community;

(11) expert testimony concerning its use.

Finally, that section directs that in the event a case is brought pursuant to part 5 and is tried before a jury, the court shall hold an evidentiary hearing on issues raised pursuant to this section, such hearings to be conducted *in camera.*

Section 504 describes how one commits a violation of the statutory mandate of anti-possession of drug paraphernaila: One violates this section if he possesses drug paraphernalia and intends to use it under circumstances in violation of the laws of this state.

Section 505 proscribes the manufacture, sale or delivery of drug paraphernalia, and states that any person who sells or delivers, possesses with intent to sell or deliver, or manufactures with intent to sell or deliver, equipment, products or materials intending that such equipment, products or materials will be used as drug paraphernalia, commits a class 2 misdemeanor, and is subject to punishment as provided in Section 18-1-106.

Section 506 sets forth the penalty for advertisement of drug paraphernalia. This section provides that one who places an advertisement in a newspaper, magazine, handbill or other publication, and who (in doing so) intends to promote the sale in this state of equipment, products or materials designed and intended for use as drug paraphernalia commits a class 2 misdemeanor, and becomes subject to punishment as provided in Section 18-1-106.

To summarize:

Section 501 of the Act covers the legislative declaration concerning control of drug paraphernalia;

Section 502 defines drug paraphernalia;

Section 503 lists eleven factors which the court may consider in determining whether an object is drug paraphernalia;

Section 504 makes it an offense to possess drug paraphernalia with the intention to use it in violation of the laws of this state;

Section 505 makes it an offense to manufacture, sell or deliver drug paraphernalia with the intent that the items be used as drug paraphernalia; and,

Section 506 proscribes advertisement of items designed and intended for use as drug paraphernalia.

The trial court ruled, first of all, that the plaintiffs herein, merchants for the most part, did not have standing to represent the users or purchasers of the items here in question. The court also ruled, however, that the statute is unconstitutionally vague in at least two respects. The standard "primarily adapted, designed and intended" was held not to be an adequate one. The court also concluded that the eleven standards set forth for use by the court did not provide either notice to possible violators, nor to police officers and other enforcement officers, what factors were to be considered in ascertaining whether there had been a violation of the statute.

Generally, these are the points which this court must consider in a determination of whether the trial court erred in its conclusions.

The points advanced by the Attorney General are set forth in a summary of the argument, which in effect declares:

The Colorado Drug Paraphernalia statute is not vague.

It provides defendants with fair warning of forbidden conduct and contains sufficient standards to guard against arbitrary or discriminatory enforce-

ment. Moreover, as all the crimes defined in the statute contain specific intent as an element, the statute cannot be termed vague.

I.

Do the plaintiffs have standing?

The trial court's ruling was that while the plaintiffs have standing, that is, a stake in the outcome sufficient to challenge the Act in their capacities as potential sellers and advertisers of drug paraphernalia, they lacked standing to assert the rights of third parties, that is, the rights of purchasers or possessors of drug paraphernalia. It is true that plaintiffs lack standing to raise issues which are the private rights of potential purchasers and possessors of drug paraphernalia, and which deal with conditions and situations not properly before the court, such as whether the Act may violate the privacy of potential possessors of drug paraphernalia. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973). It is not to be denied, however, that the plaintiffs may raise the rights of potential purchasers and possessors of drug paraphernalia insofar as those rights are interrelated with the rights of the plaintiffs, and thus involve questions which are properly before the court. Plaintiffs have standing to dispute the constitutionality of the entire Colorado Drug Paraphernalia Act when attacking the validity of the Act on its face.

The case of Craig v. Boren, 429 U.S. 190 (1976), rehearing denied 429 U.S. 1124 (1977), is about as similar as a precedent could be. In *Craig* the question to be decided involved the constitutionality of an Oklahoma statute which prohibited the sale of 3.2 beer to males under 21 years of age, but which permitted sales to females between the ages of 18 and 21. In *Craig* a vendor of the beer was allowed to assert the equal protection claim of males between the ages of 18 and 21, since the statute created legal duties "addressed directly to" such vendors, and the constitutional rights of males be-

tween the ages of 18 and 21 would be "diluted or adversely effected" if the vendor's claim were to fail. *Id.* at 194-195. The Supreme Court pointed out that the vendor was in a position in which it had to heed the statutory discrimination and thus incur a direct economic injury through the constriction on its buyers market, or disobey the statutory command and suffer the sanctions. So, therefore, the vendor had a strong interest in asserting the position that it took in court. Similarly, in the instant case, the Colorado Drug Paraphernalia Act creates duties addressed directly to vendors of drug paraphernalia. By selling paraphernalia to purchasers, vendors violate the Act. Therefore, under the *Craig* rationale, plaintiffs should be allowed to assert the due process claims of prospective purchasers and possessors of drug paraphernalia, since, if plaintiffs' claims were to fail, the rights of prospective purchasers of drug paraphernalia would be diluted or adversely affected. Hence, the interests of potential purchasers and potential sellers in this statute are directly interrelated.

We agree, as well, with the finding of the district court that the federal court has jurisdiction over this case. No criminal prosecution, it is true, has commenced as a result of the enforcement of the Act. Nevertheless, the court record clearly shows that plaintiffs face real and genuine threats of prosecution under the Act so as to show the existence of an Article III case or controversy. Steffel v. Thompson, 415 U.S. 452 (1974). Accordingly, this court has jurisdiction to consider the facial validity of the Colorado Drug Paraphernalia Act.

One other matter: There is no necessity for abstaining or temporarily dislodging the case and referring it to the state court, because it is not likely that the state court's consideration of the case would either render it unnecessary for federal consideration or substantially modify essential federal constitutional questions. *See*, for example, Record Revolution No. 6, Inc. v. The City of Parma, et al, Nos. 80-3308, 80-3352, 80-3353, 6th Cir.

Dec. 8, 1980, Slip Op. at pages 15-17; High Ol' Times, Inc. v. George Busby, 621 F.2d 135 (5th Cir. 1980). We hold, therefore, that this court has jurisdiction to presently consider the merits of the complaint.

The Purpose of the Act

At the outset, we recognize that the subject matter and object of this statute is to aid in curtailing drug use by prohibiting the sale, possession and advertisement of devices which tend to facilitate, enhance, condone, and render acceptable the use of illegal drugs.

The Drug Enforcement Administration of the United States Department of Justice has drafted the Model Drug Paraphernalia Act, and this apparently has been the model for use by the several states in enacting similar statutes. The Model Act declares:

> The availability of drug paraphernalia has reached epidemic levels. An entire industry has developed which promotes, even glamorizes, the illegal use of drugs by adults and children alike. Sales of drug paraphernalia are reported as high as three billion dollars a year.

In drafting this Act the Department of Justice had the above described problem in mind. Surely the object is laudable, and unquestionably the Colorado General Assembly has the power and authority to enact a statute of this character. *See* Geiger v. City of Eagan, 618 F.2d 2 (8th Cir. 1980). This fact was acknowledged in the district court's opinion, where the court stated:

> The enactment of drug laws are certainly within the police power of the state. * * * [Such laws] go directly to the health, welfare and the public concern for the inhabitants of the State of Colorado. In the General Assembly's exercise of its police power to protect the public health, safety, morals and welfare, the purposes of the Act in question are both constitutionally and logically sound. * * * [T]here is a

nexus between the abuse of controlled substances and the glorification of devices which facilitate such abuse. • • • The is a rational relationship between these laws and a legitimate government purpose.

Specifics of the Trial Court's Ruling

The district court struck down the legislation because it found that the Act was vague on its face for two reasons: *First,* because it found the phrase "primarily adapted, designed and intended" insufficient to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; *second,* because it found that the Act fails to provide explicit standards for those charged with enforcement of the law. The court noted that the words "primarily adapted, designed and intended" had to be considered conjunctively; that the words could not be applied disjunctively. The court noted that while the items may be primarily adapted or designed or intended for the use of illegal drugs, they could not be primarily adapted and designed and intended for such purposes.

The trial court further concluded that while the Act includes eleven enumerated factors to aid in determining whether an object constitutes drug paraphernalia, the legislature failed to state that these examples or guidelines were for law enforcement officials to follow, and thereby, they have allowed the police too much administrative discretion in the enforcement of a penal statute. The court noted that the Model Act provides that the guidelines should be considered by a court *or other authority*; whereas the Colorado General Assembly has provided that the guidelines were for the use of the court, but has not said that they were available for use by the police or other enforcement authorities. The court indicated that if specific tests had been provided for *law enforcement authorities* to consider, said factors would have constituted guidance on the application of the Act and would have served to minimize the risk of arbitrary and discriminatory enforcement of the Act. *See,* Inter-

state Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968). The Judge's remarks are to be interpreted as meaning that if the General Assembly had mandated that the police, prosecutors or other authorities consider the eleven factors stated in Section 503, his conclusion would have been different.

II.

Is the definition of drug paraphernalia which is contained in House Bill No. 1190, which definition encompasses "any machine, instrument, tool, equipment or device which is primarily adapted, designed and intended" for one or more of four enumerated purposes, unconstitutionally vague and indefinite?

The trial court was unquestionably correct in its conclusion that the phrase "primarily adapted, designed and intended for use in one of the four enumerated purposes" had to be read in the conjunctive rather than the disjunctive. Therefore to constitute drug paraphernalia under that definition an item must be primarily adapted *and* designed *and* intended for use in one of the four enumerated manners or ways. This phrase in its entirety does not provide objective standards for determining what items fall within the definition of drug paraphernalia. One fault is that terms "adapted" and "designed" conflict with one another. In order to "adapt" an item for use in a particular manner, one has to make the item suitable or fit for a particular use or purpose, to make the item adjust to particular conditions or ways. *See* Third New International Dictionary, 1917 Edition. To *design*, on the other hand, means "to devise or propose for a specific function; to create, plan or calculate for serving a predetermined end." *Designed* is clear in its meaning, which is that the item is predetermined for a particular use. *Adapted* is in conflict with that definition because the word "adapted" means that something which has not been designed for a particular use has to be adapted or changed so that it can be so used. If these terms were given a very narrow meaning, it is possible

that they could be reconciled. However, the courts frown on constructing terms in a limited way and thus narrowing the statutory language. *See* Hynes v. Mayor and Council of the Borough of Oradell, 425 U.S. 610, 622 (1976); Smith v. Goguen, 415 U.S. 566 (1974); Gooding v. Wilson, 405 U.S. 518 (1972). The severing of one of the conflicting phrases is a different matter, however. If such action cures the problem and renders the statute constitutional on its face, severance can be carried out.

The Colorado statute on severability, CRS 2-4-204 (1973) provides as follows:

> *Severability of statutory provisions.* If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

This general severability clause applies to a legislative act which does not contain a specific severability provision. People v. Vinnola, 494 P.2d 826 (Colo. Sup. Ct. en banc, 1972).

The test is whether the void provision and the valid provision are essentially and inseparably connected and interdependent, one with the other, so that it cannot be presumed that the legislature would have enacted the valid provisions without the void one. Severance is impossible if the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932); Buckley v. Valeo, 424 U.S. 1, 108 (1976).

The wording of the statute passes the test in our judgment. The term "adapted" contributes virtually nothing; "designed" is the strong term. It is clear that in requiring that the product should have been designed for a particular purpose legislative intent will be upheld. "Adapted" serves no purpose either by itself or in conjunction with "designed." It can be removed without being missed, and such removal would not hinder the legislative intent of the statute.

Legislative intent is, of course, the final answer. Colorado Project-Common Cause v. Byron Anderson, et al, 495 P.2d 218 (Colo. Sup. Ct. en banc, 1972); Dorchy v. State of Kansas, 264 U.S. 286 (1924). Legislative intent is to be gleaned from the interpretation of the statute as a whole. R & F Enterprises, Inc. v. Board of County Commissioners, 606 P.2d 64 (Colo. Sup. Ct. en banc, 1980).

Must the portion which is ruled constitutionally invalid be a self contained sentence or a separate section or subsection? The answer is no. Jones v. Smith, 474 F.Supp. 1160, 1169 (S.D.Fla. 1979). Frequently courts have severed invalid sentences or clauses from a statute, rather than entire sections, in an effort to uphold the constitutionality of the Act in question. *See, e.g.,* Lipp v. Morris, 579 F.2d 834 (3rd Cir. 1978); Moore v. Fowinckle, 512 F.2d 629 (6th Cir. 1975); Planned Parenthood Ass'n. of Kansas City v. Ashcroft, 483 F.Supp. 679 (N.D. Mo., 1980). The Colorado Supreme Court has severed a sentence from a statutory section in Covell v. Douglas, 501 P.2d 1047 (Colo. Sup. Ct. en banc, 1972), *cert. denied,* 412 U.S. 952 (1973), and has severed words and phrases from a statute in Shroyer v. Sokol, 550 P.2d 309 (Colo. Sup. Ct. en banc, 1976). *See also,* Record Revolution No. 6, Inc., supra, where the Sixth Circuit stated that it could have severed the constitutionally invalid phrase in the definition of drug paraphernalia (as stated in the Act with which that court was concerned), and thereby upheld the constitutionality of the remainder of the Act, if the explicit terms of the Act

in question had not limited severability to the section describing the substantive offense. Slip Op. at p. 28. There is no such limiting instruction as to severability in the Colorado Drug Paraphernalia Act.

Accordingly, if severance of the word "adapted" renders the definition constitutional, this court is authorized to sever such a word whereby it would read "primarily designed and intended" rather than "primarily adapted, designed and intended."

The General Purpose

The general intent of the legislature in enacting this statute was to curb the use of illegal drugs by restricting the availability of drug paraphernalia. In our view this legislative intent is fostered and promoted and is not hindered by severing one of two conflicting terms which, when applied conjunctively, only serve to exclude items from falling within the definition of drug paraphernalia because of the difficulty, if not impossibility, of defining an item as both "designed" for use and "adapted" for use with illegal drugs. Since these terms are not so intertwined that the valid term could not stand alone, this court is authorized to sever one of the two conflicting terms. Logic dictates that the word "adapted" be selected, rather than the word "designed," since the same incompatibility which exists between the words "designed" and "adapted" may also exist between the words "intended" and "adapted."

Meaning of "Designed"

We must, then, answer a further question regarding whether the Act can be upheld if the definition set forth in the statute includes any machine, instrument, tool, equipment or device which is "primarily designed and intended" for one or more of the four enumerated purposes. In so doing, we must ask: what is meant by the term "designed?"

Since the definition of drug paraphernalia in the Model Act includes any equipment, products or materials used, intended for use, or designed for use with illegal drugs, and many of the innumerable drug paraphernalia acts which were enacted in the wake of the Model Act have incorporated the same definition within their respective statutes, the term "designed for use" has been frequently interpreted by the courts.

Those statutes which follow the Model Act, at least in a basic way, have been upheld by a number of district courts. Florida Businessmen for Free Enterprise v. City of Hollywood, No. 80-6157 Civ-NCR (S.D.Fla. Aug. 29, 1980); Delaware Accessories Trade Association v. Gebelein, 497 F.Supp. 289 (D.Del. 1980); World Imports, Inc. v. Woodbridge Township, 493 F.Supp. 428 (D.N.J., 1980); Nova Records v. Sendek; No. IP80-431-C (S.D. Ind., Dec. 9, 1980); Mid-Atlantic Accessories Trade Association v. State of Maryland, 500 F.Supp. 834 (D.Md., 1980). *See also,* the Eighth Circuit case of Geiger v. City of Eagen, supra, which indicated that it considered the Model Act to be a properly drawn statute. 618 F.2d at 28, n.4. The only *circuit* court which has specifically considered the constitutionality of an Act which followed somewhat strictly the Model Act has declared the Act unconstitutionally vague and overbroad on its face. Record Revolution No. 6, Inc. v. City of Parma, supra. In *Record Revolution* it was held by the Sixth Circuit that the drug paraphernalia act before it was unconstitutional because the term "designed for use" was vague and overbroad and the specific statutory section referring to severability precluded severance by limiting it to the section describing the substantive offense. The court quoted Indiana Chapter, Norml v. Sendek, No. TH-75-142-C (S.D.Ind., Feb. 4, 1980), in which the district court discussed the term "designed" in detail and stated:

> It is unclear what is meant by an instrument 'designed' for drug use. The term 'designed' could signify only devices that have no use or function other than as a means to ingest a controlled substance.

> Alternatviely, 'designed' could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term 'designed' could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition 'designed for drug use' gives no hint to those attempting to comply with [the ordinance] what is included in the definition.

The reason for the ruling in the Sixth Circuit in *Record Revolution* holding "designed for use" to be overbroad was because the term "drug paraphernalia" could constitute any device that could possibly be used with illegal drugs, and vague because of the "lack of any design characteristics that distinguished lawful purposes from unlawful purposes." Record Revolution, *supra* at Slip Op. p. 26. The Sixth Circuit stated that if drug paraphernalia was defined in terms of the design, "the definition begins to depend upon the ingenuity or purpose of the purchaser rather than the seller and upon the current practices of the clandestine society of drug users." There are other decisions which have arrived at this same conclusion as was reached in *Record Revolution.* These are Record Head Corp. v. Sachen, 498 F.Supp. 88 (E.D. Wis., 1980); Back Door Records v. City of Jacksonville, et al, No. LR-C-80 314 (E.D.Ark., Jan. 8, 1981); Robert Forrest Weiler v. Cleo Carpenter, et al, Civ. No. 80-637 JB (D.N.M., Feb. 11, 1981); Lazy J. Ltd. v. The Borough of State College, Civ. Action No. 80-1167 (M.D.Pa., Jan. 30, 1981).

Other courts have analyzed the term "designed for use" and have reached contrary conclusions. *See* Mid-Atlantic Accessories Trade Ass'n. v. State of Maryland, *supra*; Robert Brache and Edna Franza v. County of Westchester, et al, No. 80-Civ-4228-CSH (S.D.N.Y., Jan.

28, 1981).[1] *See also,* The Casbah, Inc. v. Charles Thone, Civ. No. 80-0-271 (D.Neb., Sept. 26, 1980). In *The Casbah* the court held that the term "designed for use" was not vague when read in the context of the entire statute; that the term "refers not to the physical characteristics of an object but to the subjective intent or plan of the person controlling the object." *See also,* Delaware Accessories Trade Ass'n. v. Gebelein, *supra*; Florida Businessmen for Free Enterprise v. City of Hollywood, *supra.*

The courts have addressed two concerns regarding this term, therefore: overbroadness and vagueness. We call attention to the fact that the word "primarily" before the word "designed" in the Colorado Act serves to restrict the term by requiring that an item must be *primarily* designed for use with illegal drugs in order to constitute paraphernalia. The Colorado legislature eliminated the concern expressed in *Record Revolution* that any item which may conceivably be used with illegal drugs may constitute drug paraphernalia. Therefore, this term, as used in the Colorado Act, is not overbroad. We now turn to the question of whether this term is unconstitutionalty vague.

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[1] The Brache Court stated as follows:

". . . common English usage supports the district court's observation in *Mid-Atlantic* that '[d]esign connotes an intentional act as well as an objective set of characteristics.' The prosecution may have some difficulty proving that a manufacturer intentionally 'designed' for drug use an item which could have others, but that is a different question. The element of scienter necessary to preserve a law from vagueness adds, by definition, another fact for the prosecution to establish by competent evidence. The drafters of the Model Act sought to eliminate vagueness and transferred intent by requiring the requisite elements of knowledge or intent on the part of manufacturer, seller or user, in order to bring a particular artifact within the definition of 'drug paraphernalia.' I see no basis for holding that they

Vagueness Analysis of the Phrase "Primarily Designed and Intended"

We must consider whether the definition of drug paraphernalia, encompassing as it does items "primarily designed and intended" for one of the enumerated uses, is unconstitutionally vague on its face. To do this we must consider what is meant by vagueness in the context of legislative enactments. Legislative acts involving criminal violations are held to be unconstitutionally vague if, first, they do not provide sufficient notice of the conduct which is proscribed, and, second, they do not provide law enforcement authorities with adequate standards for enforcement of the law. The United States Supreme Court has clearly expressed the constitutional dimensions of the standards to be followed when drafting legislation similar to that before us. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-9, 92 S.Ct 2294, 2298 (1972). The Supreme Court said that:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide

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[1] (Continued)

> succeeded in respect of the phrase 'intended for use,' but failed with 'designed for use.' *primarily* designed for use with illegal drugs in order to constitute paraphernalia. The Colorado legislature eliminated the concern expressed in *Record Revolution* that any item which may conceivably be used with illegal drugs may constitute drug paraphernalia." Slip Op. at p. 25.

> explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

The requirement that the words of a penal statute be clear and beyond speculation presents a question of real substance. All persons are entitled to be informed as to what the statute commands or forbids. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). It goes without saying that the standards of guilt must be sufficiently-ascertainable to prevent arbitary, erratic and discriminatory arrests and convictions. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). The legislature may not abdicate its policy making functions. It must establish the standards to be followed when enforcing the statute, and do so clearly. *See* Smith v. Goguen, 415 U.S. 566, 574 (1974).

Our first step when inquiring whether the definition of drug paraphernalia, as amended, is sufficiently precise, is to determine the meaning of the word "designed" contained in the phrase "primarily designed and intended." As previously seen, the problem addressed by the cases is *whose* intent the term "designed" refers to. Courts have construed that phrase as encompassing the subjective intent of the possessor or seller or the subjective intent of third persons, such as the purchaser of the item. The cases have considered the question of *who* "designed" the item for drug use, and the courts have concluded that the term must encompass a subjective intent on the part of the purchaser or seller in order for the definition to withstand constitutional attack. In *Record Revolution, supra,* therefore, the Sixth Circuit held that since the term "intended" for use referred to the intent of the possessor or seller as the person in control of the object, that phrase was not unconstitutionally vague. However, the Sixth Circuit, in that case, held that the term "designed" for use always referred

to the intent of the purchaser rather than to the intent of the one in control of the items, such as the seller when a sale was involved; as a result the Sixth Circuit held the definition of drug paraphernalia void for vagueness.

In order to uphold the validity of a drug paraphernalia statute, therefore, it has been required that the statute enunciate that the person prosecuted for violating the Act must have both intended the item in question to fall within the definition of drug paraphernalia, and intended to commit one of the substantive offenses listed in the Act. Such an analysis is troubling since it is to be remembered that there are two requirements necessary to establish guilt for violating the Colorado Drug Paraphernalia Act. First, the alleged violator must possess, sell or advertise drug paraphernalia; second, the possessor must intend to use the paraphernalia for illegal drug purposes, or the seller must intend for the buyer of the goods to use them for illegal drug purposes. It would seem, then, to be sufficient that the subjective intent, or mens rea, of the possessor or seller is found in the latter element of the offense. So analyzed, the prosecution would have to ask: Looking objectively, is this person possessing or selling drug paraphernalia? If that question is answered in the affirmative, then the next question would be: looking subjectively, does this person intend to use the paraphernalia for illegal drug purposes or intend for the purchaser to use the paraphernalia for such purposes? Following this reasoning, then, while the definition of drug paraphernalia must be sufficiently narrow to enable possessors and sellers to reach an objective conclusion as to what items are likely to fall within that definition, it would not be necessary that the definition require that the possessor or seller of the item shall have personally designed and intended that the item be used for illegal drug purposes. The intent of the possessor or seller is manifested in the second part of the offense. The possessor or seller may not be penalized for possessing or selling drug paraphernalia unless he

has the requisite intent to use it, or for others to use it, for illegal drug purposes. So analyzed, the issue would be whether the words "primarily designed and intended" provide an objective standard for determining whether an item reasonably falls within the definition of drug paraphernalia.

The courts have not tended to follow the latter analysis, however. There is concern that it is difficult to identify drug characteristics that distinguish lawful purposes from unlawful purposes; that the crimes defined in the Act are dependent upon the validity of the definition of drug paraphernalia, and that the intent requirement is found only in the second element of the offense and not the first. To avoid vagueness problems, therefore, the courts have generally required that the statutory definition of drug paraphernalia include a subjective intent on the part of the possesor or seller.

It is well to remember that the Model Act and the Colorado Act are different. In the Model Act the definition of drug paraphernalia is stated in the disjunctive. Thus, the definition of paraphernalia in the Model Act encompasses items "used, intended for use or designed for use for illegal purposes." An item may constitute drug paraphernalia if any one of the three standards is met; that is, if the item is used, intended for use, or designed for use with illegal drugs, it constitutes paraphernalia. The definition of drug paraphernalia in the Colorado Act, however, is stated in the conjunctive. Thus, an item may only constitute drug paraphernalia if it is intended for use and designed for use in one of the four enumerated ways. Regardless of whose intent the word "designed" refers to, the intent of the possessor or seller is still required by the words "*and* intended."

For the same reason that the intent requirement in the substantive offense sections of the Colorado Act refers to the intent of the possessor or seller, the intent requirement in the definition of drug paraphernalia

also refers to the intent of the possessor or seller. The United States Supreme Court favors an interpretation of legislation in a manner which supports its constitutionality. Screws v. United States, 325 U.S. 91; 65 S.Ct. 1031, 1033 (1945). When the word "intended" is specifically part of the statutory provision, that word is fairly susceptible of a construction which requires that the intent of the person who sells or possesses would be in violation of the statute. We regard this as the plain meaning of the word, and thus, a federal court reaching such a conclusion does not exceed its authority by construing the word in a narrow, limiting fashion. Due process requires such an interpretion of the word "intended." See Record Revolution v. City of Parma, *supra*, at pages 21-23.

Accordingly, in view of the fact that the definition of drug paraphernalia in the Colorado Drug Paraphernalia Act requires intent on the part of a violator, be he possessor or seller, regardless of how the state court construes the term "designed," the statute is not unconstitutionally vague on its face with regard to the issue of subjective intent.

Are the Standards Sufficient to Guide Enforcement Officers?

The above, however, does not complete the inquiry. While the definition of drug paraphernalia in the Colorado Act meets the subjective intent requirement, that fact does not end our quest to determine whether the definition meets the constitutional test. It is necessary, in addition, that the Act provide objective standards for determining what items are likely to fall within the statutory definition. Although possessors and sellers of drug paraphernalia may be held to a higher standard of knowledge in determining whether an item which they possess or sell constitutes drug paraphernalia, Papachristou v. Jacksonville, *supra*, 405 U.S. at 162, such is not true with respect to law enforcement officers. We, therefore, must consider whether House Bill No. 1190

provides explicit standards so that law enforcement officers may not make arbitrary, erratic and discriminatory decisions. See Grayned v. City of Rockford, *supra.*

We acknowledge that it is not necessary for reasonable men to consistently reach the same conclusion in applying objective standards to a given factual situation. Thus, the fact that different minds may reach different results when seeking to determine whether a given object falls within the statutory definition of drug paraphernalia does not render the statute void for vagueness. The Supreme Court in United States v. Petrillo, 332 U.S. 1, 7; 67 S.Ct. 1538, 1541 (1947) said:

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. * * * [T]he constitution does not require impossible standards.

See also, Winters v. New York, 333 U.S. 502; 68 S.Ct. 665 (1948).

Notwithstanding the impossibility of defining standards with precision to determine whether a legislative object falls within the statutory definition of drug paraphernalia, the Act must, nevertheless, set forth sufficient standards to guard against arbitrary law enforcement. The Colorado Act lists eleven factors to be considered which are sufficiently positive and concrete. It is argued by appellees that these standards are, however, for the *exclusive* use of the court, that they are only to be used by the court in its discretion, and that this results in confusion. We disagree. Why would the General Assembly provide standards for the court's use *only?* It is more logical to conclude that the Assembly intended that the court would ultimately use these standards as part of the definition of the crime. If the court judges by reference to the standards, the enforcement machinery must also follow the standards. Enforcement authorities cannot ignore the definition. Does the fact that the court

is said to have discretion in applying the standards render the Act unlawfully vague? We say no. Our view is that the Assembly recognized that some of the standards may not apply in each and every case, and acknowledged that the court must be authorized to deal with this situation. An unchangeable mandate might be lacking in flexibility and workability.

Our conclusion is, then, that the eleven specific standards to be considered when determining whether an item falls within the definition of drug paraphernalia are not for the court's use alone. They were not intended to be withheld from the enforcement officers or anyone else administering or complying with the statute. The ultimate test as to the sufficiency of any cause of action is whether it will stand up in court. Therefore, law enforcement authorities are effectively compelled to work directly with the enunciated criteria if they are to carry out the Act.

We are aware that many of the courts which have considered this statute have tested the statute with a fine tooth comb to ascertain whether a mandate is set forth which *requires* officers to consider the enunciated factors. Some have upheld statutes as not being vague because these factors were listed and law officials were *required* to consider them when identifying drug paraphernalia. See, The Cashah, Inc. v. Thone, *supra,* wherein the court noted that since no objects were per se drug paraphernalia under the Act, a significant reason for finding the Act not unconstitutionally vague was that factors were listed which law enforcement officials had to consider when identifying drug paraphernalia. The fact that factors were listed for law enforcement officials to consider when defining drug paraphernalia was relied upon by the courts in Delaware Accessories Trade Ass'n. v. Gebelein, *supra,* 497 F.Supp. at 293, and World Imports, Inc. v. Woodbridge Township, *supra,* when upholding the constitutionality of the Acts there under consideration. Similarly, the Act upheld in Florida Businessmen for Free Enterprise v. the State of Florida,

supra, also requires law enforcement authorities to consider a list of specific factors. Contra, Nova Records v. Sendek, *supra*.

Affidavits of officers from various districts in Colorado set forth in the record show that there is confusion as to whether particular items constitute drug paraphernalia. Some of the confusion illustrated by the wide variety of conflicting opinions among law enforcement personnel as to what constitutes paraphernalia may be eliminated by removing the word "adapted" from the definition of drug paraphernalia in the Colorado Act. However, we do not consider it necessary or helpful to sever the wording which is found in § 502, the standards provision. We deem it sufficient to consider the Act as a whole, including its objectives. A construction of the Act as a whole removes doubts as to the effect of some of the wording found in it and dictates the construction which we have given to the entire Act.

In summary, it is our conclusion that the standards in question were designed to be a part of the definition of the statute, and, therefore, that the Act, considered in its entirety, shows a legislative intent to make the eleven standards provided by the Assembly, a part of the definition of the crime.

Accordingly, we conclude that the Act avoids the charge that it is vague, and therefore in violation of the due process clause of the Fourteenth Amendment.

Therefore, we must reverse the judgment of the district court and remand the cause for further proceedings consistent with the analysis contained in this opinion.

It is so ordered.

UNITED STATES DISTRICT COURT
Southern District Of Indiana
Terre Haute Division

INDIANA CHAPTER (NORML), et al.,

Plaintiffs,

vs.

THEODORE L. SENDAK, et al.,

Defendants.

No. TH 75-142-C

MEMORANDUM OF DECISION

This matter is before a Three-Judge Court as authorized by 28 U.S.C. §2281. Repeal of 28 U.S.C. §§2281, et seq., does not apply to this action since this action was filed before August 12, 1976, the date of appeal. The Honorable Thomas E. Fairchild, Chief Judge of the United States Court of Appeals for the Seventh Circuit, designated the Honorable Luther M. Swygert, Judge of the United States Court of Appeals for the Seventh Circuit, and the Honorable Cale J. Holder, Judge of the United States District Court for the Southern District of Indiana, to serve with the Honorable S. Hugh Dillin as members of a Three-Judge Court to hear this cause.

Background

Plaintiffs can be arranged in three groups. The first plaintiff group is the Indiana Chapter of the National Organization for the Reform of Marijuana Laws, Inc. (NORML), an organization seeking the easing of restrictions on marijuana use. The second group consists of five individuals who are Indiana residents and who are in the business of manufacturing, selling, or distributing items that are either specifically mentioned in the challenged statute or arguably come within the general ban of the statute. The third group is made up of four persons who are Indiana residents and who posesss items that may fall within the statutory ban.

Five defendants are named. The first is Theodore L. Sendak, the Attorney General for the State of Indiana. Sendak is sued both individually and in his official capacity. The other four defendants are the prosecuting attorneys for four Judicial Circuits of Indiana: the 19th Circuit, the 10th Circuit, the 43rd Circuit, and the 1st Circuit.

Plaintiffs filed their original complaint on July 18, 1975 seeking injunctive and declaratory relief. In particular, plaintiffs requested the District Court to declare Sections 8 and 9 of Senate Enrolled Act 95, proposed I.C. (1971) 35-24.1-4.1-8 and 35-24.1-4.1-9, as amended by Acts 1975, P.L. 338, effective on or about August 15, 1975, in violation of the United States Constitution. Plaintiffs labeled the suit an action in equity authorized by 42 U.S.C. §1983. Jurisdiction was based on 28 U.S.C. §§1331, 1343(3), 2201, and 2202.

On August 1, 1975, the District Court issued an order temporarily restraining defendants from enforcing Sections 8 and 9 of Senate Enrolled Act 95 until further order of the Court. On October 7, 1975, defendants filed a motion to dismiss, alleging that the District Court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief may be granted.

In 1976, the Indiana General Assembly revised and recodified the criminal laws of Indiana. Certain portions of I.C. 35-24.1-4.1-8 and -9 were amended, and the two sections were recodified as I.C. 35-48-4-8 and -9. The recodification was to become effective on October 1, 1977.

On August 3, 1977, defendants filed a motion to dismiss for failure to prosecute. On August 24, 1977, plaintiffs filed a motion to reinstate the original complaint and a request to the Clerk for entry of default of the defendants. Defendants filed a motion to strike the request to the Clerk for entry of default on the same day. All of these motions were rendered moot when

plaintiffs filed an amended complaint on September 28, 1977.

In their amended complaint, plaintiffs again sought declaratory and injunctive relief, asking the District Court to declare the amended sections unconstitutional and to bar defendants from enforcing those sections. On September 29, 1977, the District Court issued an order restraining defendants from enforcing Acts of 1977, P.L. 340, Sec. 103, 104, as codified in I.C. 35-48-4-8 and -9 until further order of the Court.

Defendants filed a motion to dissolve the District Court's restraining order on September 30, 1977, and filed a motion to dismiss the amended complaint on October 20, 1977, alleging lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Defendants also petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandate and prohibition, asking that Court to dissolve the restraining order. The petition was denied on November 16, 1977.

On April 20, 1979, a Three-Judge Court heard oral argument on the motion to dismiss and on the substantive issues raised by the original and amended complaints.

Discussion

Defendants' Motion to Dismiss

Defendants have based their motion to dismiss on three grounds: lack of jurisdiction, the doctrine of abstention, and failure to state a claim. The arguments made by defendants in support of their position that plaintiffs have not stated a claim will be addressed in the discussion of the merits of this action. The two procedural grounds for dismissal will be treated first.

Defendants maintain that this Court lacks subject matter jurisdiction. They argue that a suit against a state attorney general and prosecuting attorneys in their

official capacities is a suit against state agencies and thus, is not a suit properly brought under §1983, which only authorizes suits against "persons."

Defendants' jurisdictional argument is unconvincing. The jurisdictional objection stems at least in part from the position that the states are not under the domination of the federal government. The Supreme Court of the United States has wrestled with the tension between the desire to preserve state autonomy and the need to enforce federal law. In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Supreme Court distinguished between kinds of relief sought in order to resolve the tension. The high Court held that when state officials are sued, prospective but not retrospective relief may be given. The rationale for the holding was that courts could enjoin officials from disobeying the dictates of the Constitution and thus ensure the supremacy of federal law without resorting to the more intrusive tool of individual damages.

Since plaintiffs seek only prospective relief, there is no issue of state immunity. More importantly, the compromise reached by the Supreme Court in *Edelman, supra,* suggests the answer to the question of whether officials sued in their official capacities are immune from §1983 suits.

The Court of Appeals for the First Circuit has noted that, while the Supreme Court has not explicitly ruled, lower court decisions point to a position that makes the same distinction between types of relief made in *Edelman, supra.* The Court went on to hold that while many government entities are immune from suit under §1983, government officials sued in their official capacities do not share that immunity, at least when only prospective relief is sought. Maria Santiago v. Corporation de Renovacion Urbana Y Vivienda de Puerto Rico, 554 F. 2d 1210 (1 Cir., 1977).

This holding by the First Circuit does not stand alone. Section 1983, along with its jurisdictional counterpart

§1343(3), has served as the basis for many suits against public officials in their official capacities. See e.g., Rochester v. White, 503 F.2d 263 (3 Cir. 1974); Ybarra v. Los Altos Hills, 503 F.2d 250 (9 Cir. 1974). Indeed, defendants' view of §1983 would result in few if any §1983 cases being successfully brought.

Section 1983 requires the "person" sued to have acted under color of state law. When a person acts under color of state law, he usually represents the state. If defendants' view of §1983 were adopted, §1983 suits would be allowed only when the state official has acted beyond the scope of his authority. At all other times, the official would represent the state and be able to claim its immunity for himself. Section 1983 simply is not so limited a tool as to be available only to redress abuse of power by state officials. Suits seeking prospective relief against state officials sued in their official capacities are properly brought under §1983. Therefore, this Court does have subject matter jurisdiction over this suit, with jurisdiction properly grounded on 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

Defendants next argue that even if this Court has jurisdiction, the doctrine of abstention requires dismissal. This argument also fails.

Abstention is a judicially created qualification of federal jurisdiction in actions against state officials. The Supreme Court explained the doctrine of abstention in Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The Court listed three factors that were present in that case and that called for abstention. The first factor is present when the disposition of a state law question involved in the case can moot or narrow the scope of the federal constitutional issue. The second factor occurs when the state law question raises difficult, obscure, or unclear issues of state law. The third factor arises when a federal decision could later be in conflict with subsequent state court resolutions of issues concerning the same

state program or regulatory scheme and thus result in confusion over that ongoing program.

In determining the applicability of abstention, it must be remember that abstention is the exception, not the rule. The issue of abstention arises only after a litigant has fulfilled all of the statutory requirements for federal jurisdiction. Thus, whenever a federal court abstains, the litigant is forced to undergo state procedures or await state enforcement action in an area where Congress has said he is entitled to access to federal courts. While abstention is an effective tool to avoid needless friction between federal and state courts, it is a tool to be used cautiously.

The Supreme Court listed three factors in *Pullman, supra,* that called for abstention. It is unclear whether the presence of just one or two of those factors mandates abstention. A strong argument can be made that all three factors need to be present before abstention is proper. This Court, however, need not decide if all three factors must be present since none of the factors is present in this case.

Since plaintiffs raise a vagueness objection, it is a remote possibility that any construction of the statutory provisions of the statute by the state courts would alter the federal constitutional issue. The Supreme Court came to a similar conclusion in Bagett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

In *Bagett, supra,* the Court reversed a district court's decision to abstain from a suit in which the plaintiffs challenged an oath requirement as unconstitutionally vague. The Court explained:

> ". . . their complaint is that they, about 64 in number, cannot understand the required promise, cannot define the range of activities in which they might engage in the future, and do not want to forswear doing all that is literally or arguably within the purview of the vague terms. In these circumstances

> it is difficult to see how an abstract construction of the challenged terms such as precept, example, allegiance, institutions, and the like, in a declaratory judgment action could eliminate the vagueness of these terms. It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this." 377 U.S. 378.

As was the case in *Bagett, supra,* plaintiffs here challenge the provisions as being unconstitutionally vague. Resort to state court for resolution of state law issues cannot moot the constitutional issue nor shape the scope of the issue. Despite individual enforcement proceedings, the statutory provisions will remain open to a vagueness challenge. Only extensive litigation over the meaning of the general defintion of paraphernalia and the meaning of the numerous terms listed as examples of paraphernalia will end the issue of vagueness. The first factor listed in *Pullman, supra,* is not present.

Since the issue raised by plaintiff is that of constitutional vagueness, this is not a case which raises difficult or obscure state law questions. The state courts enjoy no special expertise in determining whether a statute violates the United States Constitution because of vagueness. Moreover, the case before this Court does not involve a morass of complicated Indiana law. The only statutes which need to be considered are the very statutes under attack. Therefore, the second factor listed in *Pullman, supra,* is not present.

Finally, a decsion by this Court as to the constitutionality of the statutes in question will not interfere with any ongoing state program or regulatory scheme. This is not a case of a federal court ruling on certain aspects or procedures of a state program which will continue after the ruling. A decision in this case as to the constitutionality of the paraphernalia statutes will

result either in the end of such regulation or the unchanged continuation of such regulation. Thus, the third factor cited in *Pullman, supra,* is not present.

Since none of the factors discussed in *Pullman, supra,* are present, much less any combination of those factors, this case is not an appropriate case for abstention. Before turning to the merits of the case, it is necessary to deal with one more jurisdictional objection.

Defendants argue that plaintiffs have no standing to challenge the alleged vagueness of the provisions in question. Defendants point out that plaintiffs have never been charged with violating the provisions and argue that plaintiffs therefore bring no real controversy before the Court but offer only hypothetical cases and problems. This argument is unconvincing.

Title 28 U.S.C. §2201 provides federal courts with jurisdiction to make declaratory judgments in order to allow parties to have a determination of their rights and obligations without having to risk criminal sanctions. Such declaratory relief is especially appropriate in this case. Plaintiffs have alleged that one of the harms resulting from the vagueness of the statute is that people will avoid possessing or selling any item arguably within the statutory ban, even though that item is lawful. Thus, in order to avoid the uncertainty stemming from the statute's vagueness, people will not engage in lawful activity in order to avoid involvement in criminal prosecutions where the statute's reach and vagueness could be challenged. In such a situation, declaratory relief is appropriate. There is a real controversy between the parties over the constitutionality of these statutory provisions. A resolution of this controversy need not depend on a criminal enforcement proceeding that may occur in the future.

The Merits of the Complaint

While plaintiffs have recited a litany of constitutional objections to the statutory provisions in ques-

tion, there is only one real issue involved in this case: whether the provisions are unconstitutionally vague. The first step in dealing with the claim of vagueness is to examine the provisions.

When this suit was originally filed, the paraphernalia statutes in force were I.C. 35-24.1-4.1-8 and -9, as amended by Acts 1975, P.L. 338. These sections were repealed by Acts 1976, P.L. 148 and reenacted as I.C. 35-48-4-8 and -9, as amended by Acts 1977, P.L. 340. Thus, the statutory provisions still in existence are I.C. 35-48-3-8 and -9. It is the constitutionality of these provisions that must be determined.

Indiana Code 35-48-4-8, as amended by Acts 1977, P.L. 340 provides:

> "(a) A person who possesses, with intent to violate this article, an instrument designed for smoking or injecting a controlled substance commits possession of paraphernalia, a Class A misdemeanor. However, the offense is a Class D felony if the person has a prior conviction of an offense involving paraphernalia."

Indiana Code 35-48-4-9, as amended by Acts 1977, P.L. 340, provides:

> "(a) A person who:
>
> (1) knowingly or intentionally manufactures or delivers paraphernalia;
>
> (2) possesses, with intent to manufacture or deliver, paraphernalia;
>
> commits dealing in paraphernalia, a Class D felony.
>
> (b) "Paraphernalia" means an instrument used, designed for use, or intended for use in ingesting, smoking, administering, or preparing marijuana, hashish oil, or cocaine; and includes:
>
> (1) metal, wooden, acrylic, glass, stone, plastic, or ceramic marijuana or hashish pipes with or

without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes designed for use or intended for use with marijuana, hashish, hashish oil, or cocaine;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips;

(6) separation gins designed for use or intended for use in cleaning marijuana;

(7) cocaine spoons and vials;

(8) chamber pipes;

(9) carburetor pipes;

(10) electric pipes;

(11) air driven pipes;

(12) chilams;

(13) bongs; and

(14) ice pipes or chillers."

The requirement that laws not be vague emanates from the guarantee of due process articulated in the Fifth Amendment. The requirement is applied to the states and their subdivisions by the Fourteenth Amendment and is a limit on the exercise of government power. Due process does not impose a constitutional requirement of absolute precision in legislative enactments. Due process does not mandate fair notice to those subject to the law and sufficient guidelines to those enforcing the law.

A statute is unconstitutionally vague when the wording used fails to give fair notice of what is prohibited. A statute must communicate the difference between lawful and unlawful conduct. Especially in the area of criminal law, a statute must be explicit enough to inform those subject to the law what conduct will result in criminal liability. People of ordinary intelligence cannot be made to guess at the meaning of a criminal law. See

e.g., Connally v. General Construction Co., 269 U.S. 385, 391 (1962); Winters v. New York, 333 U.S. 507, 515-516 (1948); Bambu Sales, Inc. v. Gibson, 474 F.Supp. 1297, 1304 (D.N.J. 1979).

Due process also requires sufficient guidelines for those who apply the law in order to prevent selective or arbitrary enforcement. The void-for-vagueness doctrine is designed in part to preclude unfettered government discretion in enforcing a statute so vague that evenhanded administration of the statute is impossible. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, 415 U.S. 566 (1974); United States v. Lambert, 446 F.Supp. 890, 896 (D.Conn. 1978).

The first statutory provision challenged as unconstitutionally vague is I.C. 35-48-4-8. This provision makes it a crime to possess paraphernalia with the intent to violate the drug laws. Paraphernalia is defined as "an instrument designed for smoking or injecting a controlled substance."

The definition of paraphernalia used in the possession of paraphernalia statute fails to meet the standard of sufficient clarity mandated by the guarantee of due process. It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with I.C. 35-48-4-8 what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

The definition of paraphernalia also fails to answer the question, "'designed' by whom?" The statute may be limited to instruments designed by the manufacturer for drug use. The crucial problem is that objects arguably within the scope of the statute include many instruments that can be used for legitimate purposes as well as for the ingestion of drugs. The shop owner or buyer may be surprised to learn that his separation gin, pipe, hand mirror, or paper clip qualifies as paraphernalia because the original manufacturer had built the item with the idea that it would be used for the ingestion of controlled substances. The uncertainty continues if the statute is read to include as paraphernalia any item designed or marketed by the shop owner for drug use. The buyer will find himself in possession of an item that is considered to be paraphernalia because of the assumption or intent of another.

In its broadest sweep, the statutory definition of paraphernalia could be read to include any item designed by the possessor of the item for drug use. Again there is no way of knowing what items are paraphernalia and what items are lawful to possess. One cannot tell in advance whether a paper clip, hand mirror, teaspoon, or corncob pipe will be labeled paraphernalia. Whether an item is paraphernalia will depend on the characterization given by the arresting officer, deputy prosecutor, or judge. In addition to the lack of notice given to those subject to the statute, this broad definition of paraphernalia is not sufficiently explicit to prevent arbitrary or selective enforcement.

Whether an instrument is "designed" for drug use will depend on the state officials' evaluation of the character and purpose of the possessor of the device. Since the devices capable of use with drugs often have legitimate uses as well, the state officials—arresting officer, prosecutor, judge—will decide for which use the individual has the device.

Plaintiffs argue that this possibility of arbitrary enforcement constitutes a violation of equal protection, since the lack of guidelines will result in disparate treatment. For example, plaintiffs argue that an owner of an exclusive export-import boutique that sells ornate smoking devices will not be considered to be in possession of paraphernalia, whereas the owner of a record store that caters to young people and which sells the same device will be viewed as possessing paraphernalia. Such predictions of disparate enforcement cannot be the basis of any ruling by this Court. Moreover, the constitutional infirmity is more properly one of vagueness than equal protection. The real difficulty with the definition of paraphernalia is that the owner of the export-import boutique is in the same quandary as the owner of the record shop. Whether the items sold in either the boutique or record shop will be deemed to be paraphernalia depends on an ad hoc characterization by state or county officials. Such a state of uncertainty for all citizens constitutes impermissible vagueness.

Defendants argue that even with all of the notice problems inherent in I.C. 35-48-4-8 there is no unconstitutional vagueness because of the intent requirement of the provision. In Screws v. United States, 325 U.S. 91 (1944), the Supreme Court did hold that a requirement of willful or purposeful action obviates the need for notice; however, the intent requirement of I.C. 35-48-4-8 fails to eliminate the need for notice.

Indiana Code 35-48-4-8 requires that to be guilty of possession of paraphernalia, a person must possess paraphernalia "with intent to violate this article"—that is, with intent to violate the drug laws of Indiana. The reason this requirement does not obviate the need for notice is that it is a bootstrapping notion of intent. The danger is that intent will be inferred from the mere fact of possession. The Supreme Court used the word "willful" in *Screws, supra,* in order to describe the strong requirement of intent needed to obviate the need for

notice. The rationale of *Screws, supra,* was that there is no need to warn someone of the criminal nature of an act which he already knows is crimianl. Intent to violate the drug laws will have to be determined by looking at all the circumstances. The main, and often only circumstance will be possession of a device deemed on an ad hoc basis to be paraphernalia. Given the inability of the statute to specify what is or is not paraphernalia and given the bootstrapping nature of the intent requirement, there is a clear danger that people who did not intend to violate I.C. 35-48-4-8 and did not think they were in violation of the law will nevertheless be deemed to be in possession of paraphernalia. Such a possibility demonstrates a lack of a sufficient willfulness requirement to save I.C. 35-48-4-8 from unconstitutional vagueness.

The second statute under attack is also unconstitutionally vague. Indiana Code 35-48-4-9 seeks to punish dealing in paraphernalia. Dealing is defined as possessing paraphernalia with intent to manufacture or deliver. Paraphernalia is defined as an "instrument used, designed for use, or intended for use" in preparing, ingesting, or administering marijuana or cocaine.

The same vagueness problems previously discussed with regard to I.C. 35-48-4-8 are present with the use of the word "designed." Moreover, I.C. 35-48-4-9 suffers from additional flaws of vagueness.

If the phrase "designed for use" is limited to items that the manufacturer or distributor designed for drug use, I.C. 35-48-4-9 does not give fair notice to manufacturers who wish to avoid violating the provision. The statute includes in its definition of paraphernalia instruments "used" and "intended for use." This means that a person could be deemed a dealer in paraphernalia because the buyer of his product intends to use the item to administer drugs. For example, a maker of corncob pipes or tie bars could be brought under the provision's sanctions because a customer of his has devious designs for the otherwise legitimate item. A maker of

pipes, spoons, or hand mirrors could be found to be in violation of the statute because his legitimate products are bought by a middleman who intends to advertise and sell the products as drug devices or who sells them simply as pipes or spoons but to someone who later uses the items to ingest drugs. Thus, someone can be considered to be dealing in paraphernalia because of the intent of someone once, twice, or even several times removed. The same problem of lack of notice faces a seller who may sell items such as pipes or spoons or paper clips to someone who intends to use the items for the ingestion of drugs rather than for their legitimate functions.

Indiana Code 35-48-4-9 does not sufficiently separate lawful and unlawful conduct. The provision gives no fair notice to those subject to its strictures, and the provision does not provide sufficient guidelines to those enforcing the statute. Therefore, I.C. 35-48-4-9 is unconstitutionally vague. Moreover, the intent requirement of the provision does not obviate the need for notice. The intent required by I.C. 35-48-4-9 is intent to manufacture or deliver the devices. Obviously, the manufacturer of the pipes or tie bars or paper clips intends to build his product, and the distributor of the product intends to deliver the product. The unresolved uncertainty is whether the item manufactured or delivered is paraphernalia. The provision does not give a sufficient answer to that question.

While the general definition of paraphernalia supplied in I.C. 35-48-4-9 is so vague as to doom the provision, there are additional problems with the specific examples of paraphernalia listed. These problems stem from overbreadth as well as vagueness.

A paraphernalia statute that prohibited possession of pipes would be subject to a challenge of overbreadth in that the statute would prohibit lawful activity in its effort to reach unlawful conduct. In trying to avoid overbreadth, I.C. 35-48-4-9 is unconstitutionally vague.

The statute does not ban pipes, but the provision does prohibit "marijuana pipes." Labeling the outlawed pipes as "marijuana pipes" is a conclusory qualification that fails to avoid problems of vagueness. No definition of "marijuana pipes" is given, but it would appear that any pipe used or designed for use with marijuana would qualify. This means that the same unconstitutional vagueness that results from the definition of paraphernalia as any item "designed" for drug use is present. The same vagueness problem afflicts the water pipe and separation gin examples listed in I.C. 35-48-4-9.

"Roach clips" and "cocaine spoons and vials" are two other examples of paraphernalia listed in I.C. 35-48-4-9. The unconstitutional vagueness that would result from listing as paraphernalia clips or spoons "designed or intended" for drug use is avoided only by using a conclusory label. It is doubtful that the examples include only items specifically sold as roach clips or cocaine spoons. The ban could easily be avoided by selling the items as "clips" or "spoons." The examples more likely include all spoons or clips that are used or "designed" to be used or that could be used with drugs. The use of a conclusory label fails to avoid the problem of vagueness.

In summary, this Court holds that I.C. 35-48-4-8 and I.C. 35-48-4-9 are unconstitutional because they fail to meet the due process requirement of sufficient explicitness. Because I.C. 35-48-4-8 and I.C. 35-48-4-9 fail to provide fair notice to those subject to their sanctions and do not include sufficient guidelines to prevent arbitrary and selective enforcement, this Court finds these statutory provisions unconstitutionally vague.

Dated this 4th day of February, 1980.

/s/ Luther M. Swygert
Luther M. Swygert, Judge
United States Court Court of Appeals
For the Seventh Circuit

/s/ S. Hugh Dillin
S. Hugh Dillin, Judge
United States District Court
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DISSENTING OPINION

I respectfully disagree with the majority opinion or ruling of this three-judge District Court.

In 1975 the Indiana General Assembly amended Indiana's Controlled Substances Law. On July 18, 1975 the plaintiffs filed this action to have Sections 8 and 9 thereof declared unconstitutional. A temporary restraining order issued from the assigned judge and expired in ten days without a three-judge preliminary injunction hearing. In 1977 the Indiana General Assembly again amended Indiana's Controlled Substances law which amounted to a reenactment of Sections 8 and 9. On September 28, 1977 plaintiffs filed an amended complaint to have Sections 8 and 9 of the reenactment declared unconstitutional. A temporary restraining order again issued from the assigned judge and expired in ten days. Thus a duly enacted law of the sovereign State of Indiana has been stymied in the sanctuary of the United States District Court by the inaction of the plaintiffs for over three years.

The legislative bodies of the National and State governments have actively pursued the mission of control of the drug traffic. The Congress of the United States prefaced its drug control laws with findings and declarations which included:

> Title 21 U.S.C. Section 801(2) "The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."

Congress did not preempt such control of drugs. Title 21 U.S.C. Section 903.

The legislative branch of Indiana believed that the knowing possessor, manufacturer and deliverer of paraphernalia intending such paraphernalia to be used in violation of the drug control law should also be proscribed. This case involves a conflict between the in-

terests of those who seek to profit from the use of illicit drugs and the State of Indiana who seeks to remove a profitable enterprise based on illegal drug use from the tacit sanctions of the law. The majority ruling defeats the will and intent of the people of Indiana as twice expressed through their legislature and will be interpreted as placing a judicial stamp of approval on a business intended to capitalize on the use of controlled substances. The most visible examples of such business can be found in Indiana cities where educational institutions are located. Those institutions bring numbers of young persons, often freed for the first time of influence of older persons, into an atmosphere where they can easily be attracted to unsafe, unwise, unhealthy, or illegal activities in the drug scene. It appears a bit ridiculous to permit the merchants to openingly manufacture, possess, sell and deliver paraphernalia designed and intended for use in violating the controlled substance laws and at the same time proscribe the use of controlled drugs. Such practice undermines the objective of and enforcement of the drug control statutes by making it profitable, casting doubt in citizens mind of the integrity of drug control laws and tends to encourage and recruit violators.

The plaintiffs have suggested another basis for their claim of unconstitutionality of Sections 8 and 9 of the Act in question to which the majority did not respond. Plaintiffs assert that because a Section 8 or Section 9 violation by manufacture of, possession of, and delivery of paraphernalia designed for use of forbidden drugs cannot exist without the existence of proof of another crime involving controlled substance, somehow such renders Sections 8 and 9 constitutionally infirm. If such was the law many of our criminal statutes would be unconstitutional. No research is required to reject such a conclusion. Many crimes require proof of lesser included offenses and I can first refer to the crime of homicide. It was suggested that since another crime must be proved in order to prove a Section 8 or Section 9 offense that Sections 8 and 9 enactments by the General Assembly were useless. This, if true, may be a substantial basis

for lobbying the Indiana General Assembly but cannot support a finding of unconstitutionality of Sections 8 and 9.

A Section 8 or Section 9 offense is not duplicitous of any of the other offenses relating to controlled substances. A Section 8 or Section 9 offense conviction will not support a plea of double jeopardy of a charge of violation of any of the other offenses relating to controlled substances. A specific separate legal and factual element in addition to the legal elements and facts of any of the other offenses relating to controlled substances must be alleged in an indictment and proved beyond a reasonable doubt in the courts of Indiana before a defendant can be found guilty of a Section 8 or Section 9 offense. A Section 8 offense has the additional element of "possession with intent to violate this article, an instrument designed for smoking or injecting a controlled substance," a misdemeanor offense named by the Indiana General Assembly as "Possession of Paraphernalia". A Section 9 offense has the additional element of "knowingly or intentionally manufacturing, or delivering, or possessing with intent to manufacture, or deliver an instrument used, designed for use, or intended for use in ingesting, smoking, administering, or preparing marijuana, hashish, hashish oil, or cocaine," a felony offense named by the Indiana General Assembly as "Dealing in Paraphernalia".

The penalty for the offenses in question is moderately more severe than some of the other Indiana offenses relating to controlled substances. Indiana's General Assembly treatment of the need for control of narcotic drugs by outlawing non-medical narcotics is consistent with the objects of the United States Congress and that of other States legislatures. Historically, for over a half century, a network of laws, that were steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy of the citizens of this Country have been developed. Sections 8 and 9 of Indiana's law reveal the same continuing determination to turn the screw of the criminal

machinery—detection, prosecution and punishment—tighter and tighter. Indiana's efforts should not be thwarted by the plaintiffs whose tenets include the defeat of control laws of the marijuana drug.

The Indiana General Assembly has given its law enforcers two more choices of laws with which to effectively and practically deal with its advocates of the proscribed drug violaters in Indiana.

The statutory provisions challenged by plaintiffs' September 29, 1977 first amended complaint, Ind. Code (Burns 1977) 35-48-4-8 and 9 were enacted by the General Assembly of Indiana to facilitate the legitimate goals of the Uniform Controlled Substances Act as enacted by Indiana for forty-seven other States. The uniform act does not proscribe possession of paraphernalia with the intent to use such paraphernalia in violation of the Act, but other jurisdictions have enacted legislation similar to the challenged provisions. Such history does not render Sections 8 or 9 constitutional or unconstitutional.

The necessary and essential element of intent to violate the Indiana Controlled Substances Act must be proven before a person may be convicted of a violation of Section 8.

Section 9 similarly contains essential elements of knowledge and intent.

Ind. Code (Burns 1977) 35-48-4-9 reads, in part:

> "Dealing in paraphernalia—(a) A person who:
>
> (1) Knowingly or intentionally manufactures or delivers paraphernalia;
>
> (2) Possesses, with intent to manufacture or deliver, paraphernalia;
>
> commits dealing in paraphernalia, a Class D felony.
>
> (b) 'Paraphernalia' means an instrument used, designed for use, or intended for use in ingesting, smoking, administering, or preparing marijuana, hashish, hashish oil, or cocaine; and includes: * * *."

Under this section, mere possession or manufacture or delivery of an item which might be used to ingest, smoke, administer or prepare one of the described controlled substances is insufficient to constitute violation. Such possession, manufacture or delivery must be intentional. Moreover, the item must be proven to be paraphernalia. Subsection (b) requires the State to show that the defendant has either used the instrument, designed it for use or intended it for use in connection with controlled substances. If a person is unaware of an item's potential use as paraphernalia, or has a legitimate purpose in mind, manufacture, delivery or possession with intent to manufacture or deliver such item escapes proscription under this section. Therefore, the state is not overbroad. It encompasses only possession, manufacture or delivery for a recognized and defined purpose.

Plaintiffs here confront the Court with only a series of imagined hypotheticals. But with even those hypothetical arguments, plaintiffs have failed to meet their burden of overcoming the presumption of constitutionality.

The objectives of the statutory provisions in question are to proscribe the manufacture, possession of, or dealing in and sale of such devices with intent that they be used in the consumption of controlled substances. The goal is legitimate; the means employed by these provisions are neither unreasonably restrictive nor violative of any constitutionally protected rights.

Plaintiffs assert that the statute is unconstitutionally overbroad, claiming that possession of items intended for legitimate uses could be in violation of the statute. However, both Sections 8 and 9 of the Controlled Substances Act (Ind. Code 35-48-1-1 through Ind. Code 35-48-4-14) require that mere possession, manufacture or delivery, without more, is not a violation. Section 8 clearly defines paraphernalia, for the purposes of the statute, as an instrument "*designed for* smoking or injecting a controlled substance" (emphasis supplied) and possession of paraphernalia in violation of Section 8 of the Act can-

not be found unless the possession is coupled with the intent to violate the Act. This intent is specifically required by Section 8. Therefore, the section cannot be overbroad. By definition, an overbroad statute proscribes legal as well as illegal activity. If a person is without the intent required by Section 8, he is not in violation. Violation will only occur where the article is possessed with an intent that it be used to consume controlled substances. This same analysis applies to plaintiffs' attack on Section 9, which incorporates the intent requirement as discussed above, including a requirement of intent for purposes of definition of paraphernalia. Plaintiffs assert that possession of a pipe for smoking of tobacco or legal herbs could be made criminal by Sections 8 and/or 9. Obviously, if the possessor has no intent to use the items in violation of the Controlled Substances Act, or that the items be used in such manner, there can be no violation of Sections 8 and 9.

Plaintiffs attack the provisions as unconstitutionally vague, claiming that possession of any object could be a violation of the provisions, and further alleging that Section 9(b)(1) through 9(b)(14) proscribes possession of items for which there is no common definition. I must again point to the requirements of intent included in both sections. Without proof of intent to use the items or that another use the items for ingesting, smoking, administering, or preparing marijuana, hashish, hashish oil, or cocaine, the State cannot inculpate any person of possession, manufacture, or delivery of paraphernalia. Likewise, possession of the most obvious device could not be a violation without proof of intent. Plaintiffs claim Section 9(b)(1) through (14) contains words which have no meaningful definition. Merely because plaintiffs' edition of *Funk and Wagnalls'* does not identify the common meaning of the words used therein does not mean that the terms, or their meanings are foreign to users of controlled substances. "Paraphernalia" in the context of the drug culture has slang names designed for deception and surreptitious dealings. It means things used in drug use,

equipment; apparatus; trappings; and gear. See Webster's New World Dictionary of the American Language 1067 (College Ed. 1966). Indeed, the statute appears to deal with such persons in terms readily known to them, in order that the provisions be more readily understood. A presumption of constitutionality accompanies this type of legislation. Inherent in this presumption is the power of the legislature to define crimes and to specify punishment. This power remains until the presumption is overcome. Plaintiffs have failed to meet this burden, in my view.

Plaintiffs allege that Sections 8 and 9 are unreasonable and unworkable means aimed at preventing the use of controlled substances, and as such, are violative of the equal protection provisions of the fifth and fourteenth amendments. I find that no discriminatory enforcement of these sections can occur against "head" shops and in favor of tobacconists. If both businesses sell devices with the intent that such items be used in violation of the Controlled Substances Act, both are liable. If the intent is lacking, so is the liability. Certain of plaintiffs allege they would be guiltless victims of enforcement of these sections. However, by their terms, the challenged sections cannot be enforced against any party who lacks the requisite intent and knowledge. If the State were to prosecute any person for violation of Section 9, conviction could not be had without proof of such intent and knowledge. Therefore such plaintiffs, if truly without the requisite intent or knowledge, have nothing to fear from either Section 8 or Section 9.

These sections contain no irrebuttable presumptions. The burden of proof of all essential element—possession, knowledge, and intent—would remain upon the State throughout any prosecution.

By requiring that the State prove *intent* to violate the Controlled Substances Act or proof of knowledge of use, or designed or intended use to violate same *coupled with possession* of the items defined in Sections 8 and/or 9,

these sections give fair warning of the conduct prohibited. The effectiveness of such warning is apparent from the plaintiffs' actions in this case. No reasonable person of ordinary intelligence could read these sections and fail to understand what conduct is proscribed. The sections provide legally fixed standards, including knowledge and intent, and do not leave law enforcement officials, judges, or juries free to decide what conduct is or is not proscribed. The terms of the statutory sections clearly provide criteria by which a person of ordinary intelligence could distinguish lawful from unlawful conduct.

Plaintiffs' reliance on the cases of *Smith* v. *Goguen*, 415 U.S. 566, 94 S.Ct. 1242 and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 as illustrative of statutes held void for vagueness instead serves to distinguish Sections 8 and 9 from statutes which are unconstitutionally vague. The statutes involved in those cases proscribed acts or conduct without requiring any showing by the State of criminal intent. The opposite is true of Sections 8 and 9 here. Without proof of *intent* to violate other provisions the Controlled Substances Act, possession of any item described by Sections 8 or Section 9 is not made illegal by such sections. Sections 8 and 9 do give fair notice of forbidden conduct to any person contemplating such conduct. Further, the sections' requirements of proof of knowledge and intent as discussed previously in addition to proof of possession or dealing prevent these sections from encouraging arbitrary and erratic arrests and convictions.

Plaintiffs allege the punitive provisions of Sections 8 and 9 to be cruel and unusual punishment in violation of the eighth amendment. Such charge is totally devoid of merit. The legislature here is combatting use of controlled substances and comparable fines and terms of incarceration are totally appropriate and constitutional.

Plaintiffs attack these provisions as contrary to the Constitution's guarantee of equal protection. But the

plaintiffs fail to show that they have become members of a "suspect class" as protected by the doctrine, or that the provisions would burden any fundamental right. Without such showing the statute must be presumed to be constitutional and should be upheld. There is no fundamental right to possess items designed for use of controlled substances with intent to so use them or that others so use them.

Plaintiffs' attacks based on the right to privacy and the commerce clause are equally spurious. No jurisdiction has found possession or use of controlled substances in one's home to be protected under the United States Constitution. A State may legislatively legalize or "decriminalize" use or possession of some narcotics or controlled substances, or may enact legislation which extends a shield of privacy to such conduct in one's home. But such legislation or holding is not mandated by the Constitution of the United States. The action of the Indiana legislature in enacting the challenged sections while perhaps not enlarging the area protected under the penumbra of the United States Constitution's privacy safeguards, certainly does nothing to abrogate those same safeguards.

As to plaintiffs' commerce clause argument, little need be said. These sections clearly are reasonable exercises of the State's police power which are rationally related to legitimate goal—enforcement of the Controlled Substances Act. As the sections cannot be violated without the above-mentioned elements of intent and knowledge, no innocent commerce would be burdened thereby. If interstate commerce in violation (with the requisite intent) is hampered by enforcement, such enforcement cannot be unreasonable. The mere fact that conduct is proscribed in one State and not in another does not necessarily violate the commerce clause. Congress certainly has not sought to pre-empt this area of litigation from State action. In fact the reverse is true. Congress has encouraged the States to enact legislation in this area.

The above responses to plaintiffs' claims support the challenged provisions on the merits. They do not consider other arguments which these defendants have, in my opinion, successfully presented. Clearly, these plaintiffs lack any standing to challenge the constitutionality of these sections. There has been no enforcement, consequently, there has been no possibility of deprivation of any constitutional right. There is no real case or controversy before this panel which presents real and individual facts from which such deprivation might be found. Indeed, if plaintiffs' possession of any items is so innocent as they insist, plaintiffs will not be liable under the sections when they are in force. Thus, the same conclusion is reached upon defendants' motions as is reached on the merits.

Plaintiffs, who profess no intent to use any items or deal in any items intended to violate the Controlled Substances Act, cannot claim an actual controversy with the State as they cannot be convicted of violation of Sections 8 and/or 9 without proof of such intent.

Plaintiffs can show no injury in fact, nor is the interest they seek to protect (the ability to possess or deal in, with intent to violate the Controlled Substances Act, paraphernalia) within any statutory or constitutional guarantee asserted by plaintiffs. Without such showing, plaintiffs have no standing to bring this action.

As no State Court has yet placed any construction on the language of these sections, the majority's preemptive decision deprives the State of the opportunity to construe these sections within the constitutional umbrella, a construction easily arrived at, as the foregoing illustrates. (One could by examination of the record of this case note the reasons for such failure of State action—two "temporary" restraining orders, granted without notice or hearing and in disregard of repeated motions to dismiss or dissolve by defendants which have remained in effect sequentially since August 1, 1975.) Clearly, plaintiffs' action and the decision of the ma-

jority stand opposed to the doctrines of standing, ripeness and abstention. Plaintiffs' pre-emptory attack on the sections and their summary nullification by this Court, both before and after the majority ruling have deprived the people of the State of their right to self-government in adopting legitimate measures and means for restricting criminal conduct.

The majority could have salvaged Sections 8 and Section 9 under the savings clause of the Indiana statute by limiting such opinion or ruling to the word "used" in Section 9(b). Instead all of Sections 8 and 9 have been struck down without the opportunity for an Indiana Court construction of Indiana laws.

I find Ind. Code (Burns 1977) 35-48-4-8 and 9 constitutional, that judgment denying plaintiffs' requests should be entered and I would DISMISS the action of plaintiffs with costs to be assessed against the plaintiffs.

Dated this 4 day of February, 1980.

/s/ Cale J. Holder

Cale J. Holder, Judge, United States District Court for the Southern District of Indiana, Designated Member of Three-Judge Trial Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LAZY, J., LTD. A Pennsylvania Corporation, QUICK-DRAW ACCESSORIES, INC., A Pennsylvania Corporation, DAVID A. TALMAS, an individual, JAMES E. BAUER, an individual,

Plaintiffs,

vs.

THE BOROUGH OF STATE COLLEGE,

Defendant.

CIVIL ACTION NO. 80-1167
(Filed January 30, 1981)

MEMORANDUM AND ORDER

Plaintiffs Lazy J., Ltd., Quickdraw Accessories, Inc., David A. Talmas and James E. Bauer filed the above-captioned action on October 10, 1980 seeking to enjoin the Defendant from enforcing Ordinance No. 982, The Drug Paraphernalia Ordinance of the Borough of State College. On October 29, 1980 a hearing was held before the Court on the question of whether State College Borough should be enjoined from enforcing Ordinance No. 982. Today, for the reasons that follow, the Court will enter an Order declaring Ordinance No. 982 unconstitutional and enjoining the Borough of State College from enforcing its provisions.

The issue presently before the Court is hardly one of first impression. In fact, this is one of a score of recent District Court opinions judging the constitutionality of drug paraphernalia ordinances, and thus far decisions have gone both ways.[1] On the Circuit level, however, three

[1] To date, drug paraphernalia statutes have been upheld as Constitutional in the following cases: Levas v. City of Antoich, No. 80-C-1574 (N.D. Ill. Aug. 15, 1980);

recent decisions have held drug paraphernalia statutes unconstitutional in whole or in part.[2] Therefore, realizing that so many courts have faced these issues, we will attempt to explain our decision with as much brevity as circumstances will allow.

Although Plaintiffs have raised several grounds in their challenge to the Borough Ordinance, the primary issue we face is whether the Ordinance is so vague as to violate the due process clause of the Fifth and Fourteenth Amendments to the Constitution. In *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972), the Supreme Court described the policies behind the due process doctrine of vagueness.

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[1] (Continued)
World Imports, Inc. v. Woodbridge Township, 493 F. Supp. 428 (D.N.J. 1980); Delaware Accessories Trade Association v. Gebelein, No. 80-285 (D.Del. 1980); Florida Businessmen for Free Enterprise v. City of Hollywood, No. 80-6157 (S.D. Fla. Aug. 29, 1980); Casbah, Inc. v. Thone, No. 80-0-271 (D. Neb. Sept. 26, 1980); Florida Businessmen for Free Enterprise v. Florida, No. TCA 80-0954 (N.D. Fla. Sept. 30, 1980); Tobacco Accessories v. Treen, No. 80-3372 (E.D.La. Oct. 28, 1980); Mid-Atlantic Trade Accessories Trade Association v. Maryland, No. H-80-1343 (D. Md. Nov. 11, 1980); Nova Records, Inc. v. Sendak, No. IP 80-431-C (S.D.Ind. Dec. 9, 1980).

Other decisions have held drug paraphernalia statutes to be unconstitutional in whole or in part. These include Knoedler v. Roxbury Township, 485 F. Supp. 990 (D.N.J. 1980); Record Museum v. Lawrence Township, 481 F. Supp. 768 (D.N.J. 1979); Bambu Sales Inc. v. Gibson, 474 F. Supp. 1297 (D.N.J. 1979); Indiana Chapter, NORML, Inc. v. Sendak, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980); Backdoor Records v. City of Jacksonville, NO. LRC 80-314 (E.D. Ark. Jan. 8, 1981).

[2] Geiger v. City of Eagen, 618 F. 2d 26 (8th Cir. 1980); Record Revolution No. 6, Inc. v. City of Parma, Civ. No. 80-3308 (6th Cir., Dec. 8, 1980); The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, No. 80-1462 (7th Cir., Jan. 12, 1981).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Id., at 108-09.

It is the opinion of the Court that the Borough Ordinance fails to meet both of the *Grayned* requirements, (1) it fails to provide adequate notice of what conduct it intends to make illegal, and (2) it impermissibly delegates subjective policy decisions to policemen, judges and juries. And because the inherent vagueness of the law cannot be cured by the severance of any particular provision, the Court will enter an Order today declaring Ordinance No. 932 of the Borough of State College unconstitutional in its entirety.

The Court has reached its opinion for the following reasons. First, we find that the phrase "designed for use" as contained in the definition of drug paraphernalia is improperly vague. Second, we reject the notion that the vagueness of the Ordinance can be cured by the requirement of specific intent. Third, as noted above, we find that the Ordinance improperly delegates subjective policy matters to policemen, judges and juries. Finally, we have concluded that the prohibition against advertising drug paraphernalia contained in Section 3(D) of the Ordinance is unconstitutionally vague and overbroad. We will now briefly address each of these issues.

The central target of recent decisions striking down drug paraphernalia ordinances as vague has been the phrase "designed for use." The Borough Ordinance defines drug paraphernalia in pertinent part as follows:

> "The term "Drug Paraphernalia' means all equipment, products and materials of any kind which are used, intended for use, or designed for use. . . (with a controlled substance)."

The Ordinance goes no further in defining or limiting the meaning of the word "designed". As the statute reads, therefore, "designed" could signify devices that have been specifically manufactured for the purpose of the ingestion of drugs, or it could include any device which has a legitimate function, but whose properties are such that it could be used for the ingestion of drugs. This all inclusive definition of drug paraphernalia has several harmful effects. First, it allows the intent of persons other than those charged under the Ordinance to be controlling on the definition of drug paraphernalia. Thus despite the assurances of the Borough officials and the drafters of the Model Act,[3] an object can be

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[3] Ordinance No. 982 was enacted, with certain exceptions in accordance with the Model Drug Paraphernalia Act drafted by the United States Department of Justice. The Comments to the Model Act seem to indicate that the intent of remote parties does not affect the definition of drug paraphernalia.

> "To insure that innocently possessed objects are not classified as drug paraphernalia, Article I makes the knowledge of criminal intent of the person in control of an object a key element of the definition . . . [W]hen an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the article is subject to control. . ." MDPA Comments, p. 6.

This interpretation was adopted by several of the District Courts upholding versions of the Model Act. See Middle Atlantic Trade Accessories Trade Association, supra; Record Revolution No. 6, Inc. v. City of Parma,

classified as drug paraphernalia simply because a remote designer intended that it be used with drugs, or because a third party adapted an object to be used with drugs. Thus one of the saving factors of those ordinances that have been upheld, that the definition of drug paraphernalia includes a requirement of intent of the person charged under the Ordinance, simply is not true when the term "designed for use" is included.

The second problem is that the term "designed for use" is so vague that the range of objects that can be construed to be drug paraphernalia is simply unlimited. The Ordinance does not attempt to describe what design characteristics distinguish the lawful and unlawful uses of the objects in question.[4] In addition, as noted above, the term designed can mean the purpose for which an object was manufactured, the manner in which the object was adapted, or the intent with which the object is possessed. In *Indiana Chapter, NORML* v. *Sendak*, No. TH 75-142-C (S.D. Ind. Feb. 4, 1980) the District Court similarly found the term "designed for use" to be unconstitutionally vague. As the Court said:

> ". . . [T]he term 'designed' could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a make-

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[3] (Continued)
492 F. Supp. 1157 (N.D. Ohio, 1980), rev'd and remanded, Civ. No. 80-3308 (6th Cir. Cir., December 8, 1980).
It is our opinion today that the phrase "designed for use" allows the criminal intent of remote persons to determine whether an object is drug paraphernalia, and the comment noted above is not supported by a fair reading of the Act.

[4] While certain witnesses at the hearing held on October 29, 1980 attempted to describe those physical characteristics which would make an object "designed for use", such as the size of the bowl, and the presence of screens, the Act itself can provide no definitive properties which necessarily render an object "designed for use."

> shift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition 'designed for drug use' gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not." Id., slip op. at 12-13.

Thus the definition of drug paraphernalia, being limited neither by the intent of the person charged, nor by any objective standards, is unreasonably vague.

The second reason for declaring the Ordinance unconstitutionally vague is the difficulty we have in applying the principles of *Screws* v. *United States*[5] and *Boyce Motor Lines* v. *United States*[6] to the present issue. *Screws* and *Boyce* narrowly applied the doctrine that specific intent *can* cure a statute of a vagueness problem. But as the Parma court explained, "the Supreme Court has never . . . held that the imposition of a scienter element upon a statute necessarily renders the statute's prohibitions sufficiently precise to withstand a vagueness challenge." Id., slip. op., at 33. As Justice Jackson argues in his dissents in *Screws* and *Boyce*, it is impossible for one to intend to violate a law when he cannot understand the meaning of that law.[7] Indeed we are per-

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[5] 325 U.S. 91 (1945)

[6] 342 U.S. 337 (1952)

[7] Note also the following commentary on Justice Jackson's dissent in Boyce:

> "But as Justice Jackson correctly pointed out in his dissent, scienter—at least as it has been traditionally defined—cannot cure vagueness in a statute or regulation. One 'knowingly' commits an offense when he knows that his acts will bring about certain results (those defined in the statute in question), and whether he knows that deliberately causing such results is proscribed by statute is immaterial. Because it is knowledge of the existence or meaning

suaded by Plaintiff's argument that if all vague laws can be cured by an intent requirement, no criminal statute which requires a knowing or purposeful violation would ever be considered vague. In the present action, considering the lack of any standards defining "drug paraphernalia", we would be reluctant to proclaim that the intent requirement for a violation of the Ordinance cures the law of its vagueness.

Our next problem with Ordinance No. 982 is that it fails to avoid the danger of discriminatory enforcement. As the Court of Appeals for the Sixth Circuit noted, "Because the [ordinance] would permit at least the arrest and prosecution of persons by police and prosecutors who claim to know drug paraphernalia when they see it, but cannot define it any more precisely in advance, the definition of drug paraphernalia is vague and overbroad." *Record Revolution*, slip op. at 27.

It has been argued that the chances of selective enforcement are lessened by the criteria delineated in Section 2(B) of the Ordinance. Among the criteria established for determining intent are:

(1) Statements made by the owner or anyone in control of an object concerning its use;

(9) National or local advertising concerning its use;

(10) The manner in which an object is displayed for sale;

(11) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) The existence and scope of legitimate uses for the object in the community.

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[7] (Continued)

of the criminal law which is relevant, it seems clear that uncertain language in a statute is not clarified by the addition of a scienter element." Wayne LaFave and Austin Scott, Treatise on Criminal Law (1972), p. 36.

The difficulty with these standards is that they do not take discretion away from police, magistrates and judges who are to administer the act. In fact, they simply add to the subjective nature of the decision to enforce the statute. They give full leeway to the enforcing officer to determine what statements indicate an intent to use an object with drugs, what manner of advertising and what manner of displaying connote the requisite intent. For instance, in number 11, what ratio are they talking about, 2-1, 3-1, 100-1? And what difference would that make? These standards encourage speculation by the officer enforcing the statute, and in fact they fail to add any objectivity to the statute. Thus a Defendant would stand a good chance of being arrested and convicted on the basis of intent of remote parties and the subjective judgment of enforcing officers, judges, and juries. A law so constructed fails to meet the constitutional standard of due process.

Plaintiffs also challenge Section 3(D) of the Ordinance, which prohibits any advertising with knowledge that the purpose of the advertisement, in whole or in part, "is to promote the sale of objects designed or intended for use as drug paraphernalia." The United States Supreme Court has recently described the protection which the Constitution extends to commercial speech:

> "In commercial speech cases, there, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that "interest." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 48 U.S.L.W. 4783 (June 20, 1980).

The Court is in agreement with the opinion expressed by the *Parma* Court, that the Ordinance could infringe on protected speech in three ways. First, the Ordinance could be enforced against advertisers or publishers who place advertisements in printed media that circulate beyond the boundaries of State College. Second, the Ordinance could prevent the residents of State College from receiving information about the availability of items, defined as drug paraphernalia by the State College Ordinance, which are available in other cities which do not prohibit the use, sale or manufacture of those items. Third, the Ordinance's use of the words "in whole or in part" may allow the prohibition of speech discussing the reform of drug laws. Accordingly the only possible conclusion to draw is that the Ordinance at least in part tends to penalize free speech.

The Sixth Circuit Court of Appeals in *Parma* was faced with the identical problem that we now face, whether the broad prohibition is necessary to serve the interest of the Borough in protecting its citizens. The *Parma* Court held, and we agree, that the interest of the Borough is limited to regulating behavior within its own municipal boundaries. "Their legitimate interest does not include regulating the information heard or read by their citizens about the availability of legal 'drug paraphernalia' in other locales." *Parma*, slip op. at 39; see *Bigelow* v. *Virginia*, 421 U.S. 809, 827 (1975). Therefore in addressing the standards set forth in *Central Hudson Gas & Electric Corp.*, supra, we find that the regulation is more extensive than is necessary to protect the interest of the drafters of the State College Ordinance, and it therefore violates First Amendment to the Constitution.

The final questions we face today concern the manner in which the Court should most appropriately fashion relief, (1) whether the Court must declare the entire ordinance unconstitutional, and (2) whether injunctive relief is an appropriate remedy.

Section 6 of the State College Ordinance provides that "if any provision" of the Ordinance is held invalid, the invalidity does not affect other provisions of the Ordinance. The Supreme Court of the United States has long held that a provision cannot be deemed severable unless legal effect can be given the remaining provisions and it is clear that the Legislature would have intended that provision to stand. *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). It is quite clear that we cannot sever any parts of the State College Ordinance. We cannot strike a "phrase" where the Legislature allows us to strike a "provision"; and clearly the law could not stand alone without that phrase. Nor do we assume that such a deletion, along with the deletion of Section 4(D), could in itself cure the inherent vagueness difficulties presented by the Ordinance. Severability, therefore, is not an option.

Injunctive relief is appropriate in a challenge to a state ordinance where a Plaintiff has made a "clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 95 (1935); *Wooley* v. *Maynard*, 430 U.S. 705, 712 (1977). There is no question that Plaintiffs are threatened with irreparable injury if we allow this law to stand. The law creates a genuine threat of arrest, harassment and civil forfeiture, and it acts to chill the First Amendment right of free speech. Therefore the award of injunctive relief is appropriate to protect Plaintiffs' constitutional rights.[8]

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[8] During the pendency of this action, the Commonwealth of Pennsylvania amended "The Controlled Substance, Drug, Device and Cosmetic Act" to include the basic provisions of the Model Drug Paraphernalia Act. However, Section 41.1 provides that the Act shall not be deemed to preempt or supersede any local ordinance. Act of December 4, 1980, Act No. 186. Therefore the Borough Ordinance has remained in effect, and the relief awarded today is still necessary to prevent "irreparable injury" to Plaintiffs.

In conclusion, the Court holds today that State College Ordinance No. 982 is unconstitutionally vague and overbroad. In reaching this result we question not the need for legislation of this type, but the manner in which the legislation is drafted. Indeed we recognize the desire of elected officials to control the drug paraphernalia industry, an industry that not only facilitates the use of drugs, it gives drug use an almost irresistible allure. However, the Ordinance presently before the Court simply does not meet the test of precision demanded by the First and Fourteenth Amendments to the Constitution.

An Order will therefore be entered declaring State College Borough Ordinance No. 982 unconstitutional and permanently enjoining the enforcement of that Ordinance in the Borough of State College.

/s/ Richard P. Conaboy
Richard P. Conaboy
United States District Judge

Dated: January 30, 1981

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LAZY, J., LTD., A Pennsylvania Corporation, QUICK-DRAW ACCESSORIES, INC., A Pennsylvania Corporation, DAVID A. TALMAS, an individual, JAMES E. BAUER, an individual,

Plaintiffs,

vs.

THE BOROUGH OF STATE COLLEGE,

Defendant.

CIVIL ACTION NO. 80-1167

ORDER

NOW, this 30th day of January, 1981, in accordance with the attached Memorandum, IT IS ORDERED THAT:

1. Ordinance No. 982 of the Borough of State College is hereby declared unconstitutional; and
2. Officials of the Borough of State College are permanently enjoined from enforcing the provisions of that Ordinance.

/s/ Richard P. Conaboy
Richard P. Conaboy
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

RONALD E. SMITH, et al.,

Plaintiffs,

vs.

JAMES R. ROARK, et al.,

Defendants.

Civil Action No. 80-2110

MEMORANDUM ORDER

In this civil action plaintiffs challenge the constitutionality of West Virginia's recently enacted drug paraphernalia statute, W. Va. Code § 60A-4-403a.

The named plaintiffs designated in the style of this civil action as Group I Plaintiffs are engaged in the business of selling various smoking instruments, novelties and other related items of personal property. Group II Plaintiffs are employees of the Group I Plaintiffs. Group III Plaintiffs are residents of the State of West Virginia who possess smoking instruments, novelties and other related items of personal property. Defendant John D. Rockefeller, IV is the Governor of the State of West Virginia. Defendant Brigadier General H. F. Mooney, Jr. is Superintendent of the West Virginia Department of Public Safety. The remaining named defendants are prosecuting attorneys in the State of West Virginia.[1]

[1] By order entered on April 21, 1980, the court certified a plaintiff class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, consisting of the following two subclasses:

(1) All persons in the State of West Virginia who conduct, finance, manage, supervise, direct or own all or part of a business which for profit in the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives

The jurisdiction of this court is invoked under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

On March 31, 1980, the parties were heard on plaintiffs' motion for a temporary restraining order. The court granted plaintiffs' motion and a temporary restraining order was entered which enjoined defendants and the defendant class from enforcing in any manner the provisions of W. Va. Code § 60A-4-403a. By agreement of the parties, the temporary restraining order has been extended and it remains in effect as of the date of entry of this memorandum order.

Hearing on plaintiffs' motion for a preliminary injunction was, pursuant to the parties' agreement, consolidated with final hearing on the merits. The parties having further submitted memoranda of law and final arguments having been presented to the court on May 6, 1980, this matter is now before the court for decision.

I.

In response to continued public concern over the use of unlawful drugs, a number of states have in recent years enacted laws which have come to be known as drug paraphernalia statutes. Drug paraphernalia is generally regarded as encompassing devices utilized in conjunction with the unlawful use of controlled substances. A primary impetus for the enactment of drug paraphernalia laws is the belief that the unrestrained sale

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[1] (Continued)

away or furnishes various smoking instruments, novelties and other items of personal property which may fall within the statutory definition of a "drug device" found in W. Va. Code § 60A-4-403a(c);

(2) All persons in the State of West Virginia employed by members of subclass (1).

The court further certified a defendant class consisting of:

All county prosecuting attorneys in the State of West Virginia and their agents, employees and all persons acting in concert with them.

and glorification of drug paraphernalia contribute substantially to increased drug abuse.[2]

The West Virginia Legislature enacted W. Va. Code § 60A-4-403a [hereinafter, the paraphernalia statute] on February 27, 1980.[3] The major thrust of this case focuses on subsections (a), (b) and (c), providing as follows:

> (a) Any person who conducts, finances, manages, supervises, directs or owns all or part of an illegal drug paraphernalia business is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or confined in jail not less than six months nor more than one year, or both.
>
> (b) A person violates subsection (a) of this section when:
>
> (1) The person conducts, finances, manages, supervises, directs, or owns all or part of a business which for profit, in the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives away or furnishes objects designed to be primarily useful as drug devices.
>
> (2) The person knows or has reason to know that the design of such objects renders them primarily useful as drug devices.
>
> (c) As used in this section, "drug device" means an object usable for smoking marijuana, for smoking

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[2] *See, e.g.*, P. Bensinger, *Statement Before the House Select Committee on Narcotics Abuse and Control* (Nov. 1, 1979).

[3] The paraphernalia statute was signed into law by Governor John D. Rockefeller, IV, on March 8, 1980, and was to become effective on April 1, 1980. It appears in the W. Va. Code as part of the West Virginia Uniform Controlled Substance Act, W. Va. Code § 60A-1-101 to 6-605 (1977 Replacement Vol.).

controlled substances defined as tetrahydrocannabinols, or for ingesting or inhaling cocaine, and includes, but is not limited to:

(i) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) Water pipes;

(iii) Carburetion tubes and devices;

(iv) Smoking and carburetion masks;

(v) Roach clips; meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(vi) Chamber pipes;

(vii) Carburetor pipes;

(viii) Electric pipes;

(ix) Air-driven pipes;

(x) Chillums;

(xi) Bongs;

(xii) Ice pipes or chillers; and

(xiii) Miniature cocaine spoons, and cocaine vials.

In any prosecution under this section, the question whether an object is a drug device shall be a question of fact.[4]

The core of plaintiffs' challenge to the paraphernalia statute is whether the operative phrase "designed to be primarily useful as a drug device" found in subsections (b)(1) and (b)(2) is unduly vague and, therefore, violative of due process. Plaintiffs further question the validity of the paraphernalia statute on a variety of

[4] The remainder of § 60A-4-403a, consisting of subsections (d) through (g), is set forth in the Appendix to this opinion.

other constitutional grounds.[5] Inasmuch as the court's consideration of the void for vagueness issue is dispositive of plaintiffs' claims, it alone is addressed.

II.

As a general proposition, the due process clause of the Fifth Amendment as made applicable to the states through the Fourteenth Amendment requires that laws which proscribe conduct be drawn in sufficiently definite terms as to place persons of ordinary intelligence on notice of what conduct is proscribed. Three values have been identified as threatened by vague laws:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedom," it "operates to inhibit the exercise of [those] freedoms." Uncertain

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[5] These include the following: (1) The statute is not rationally related to a legitimate state purpose; (2) it is violative of plaintiffs' Fourth and Eighth Amendment rights; (3) it constitutes an unlawful taking in violation of the takings clause of the Fifth Amendment; (4) it is violative of the equal protection clause of the Fifth Amendment; (5) it effectuates an impermissible interference with interstate commerce in violation of the commerce clause; and (6) it violates plaintiffs' right of privacy as guaranteed by the First and Ninth Amendments.

> meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . then if the boundaries of the forbidden areas were clearly marked."

Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) [footnotes omitted].[6] In certain areas of public concern, however, it is recognized that it is inherently difficult to draft legislation in definite terms because the proscribed conduct is identical to lawful conduct in the absence of a criminal plan or motive. *See, e.g., Screws* v. *United States*, 325 U.S. 91, 103 (1944); *Danovitz* v. *United States*, 281 U.S. 389 (1930). It has, therefore, been held that a statute which proscribes conduct in unavoidably uncertain language may be rendered certain and, therefore, constitutionally sound, if the law further requires that the accused act with a specific intent to engage in the prohibited conduct. In such instances, persons whose activities are potentially abridged by the law are not in a position to assert that the law fails to adequately forewarn of the conduct prohibited under its terms. *Compare Screws* v. *United States*, *supra* at 103, *with Colautti* v. *Franklin*, 439 U.S. 379, 395 (1979).

In the case at bar, the paraphernalia statute incorporates two major elements which must exist in order for a person to be found guilty of having engaged in the conduct which is principally proscribed by its terms. *See* W. Va. Code § 60A-4-403a(b)(1)-(2). The court turns first to consider the element of the act itself and secondly to the element of knowledge.

A.

The act element of the paraphernalia statute requires that it be shown that an accused:

> [C]onducts, finances, manages, supervises, directs, or owns all or part of a business which for profit, in

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[6] *See also Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1974); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969).

> the regular course of business or as a continuing course of conduct, manufactures, sells, stores, possesses, gives away or furnishes objects designed to be primarily useful as drug devices.

W. Va. Code § 60A-4-403a(b)(1). Stated more succinctly, the act element requires that the accused be involved in a business which in some manner creates or furnishes "objects designed to be primarily useful as drug devices." A drug device is defined in subsection (c) of the statute as "an object usable for smoking marijuana, for smoking controlled substances defined as tetrahydrocannabinols, or for ingesting or inhaling cocaine, and includes, but is not limited to" thirteen objects or classes of objects which are then listed in the statute. W. Va. Code § 60A-4-403a(c). Thus, the act element of the paraphernalia statute requires, in part, that the object which is a subject of the accused's business activities be one which is not only usable for smoking marijuana or tetrahydrocannabinols or for ingesting or inhaling cocaine, but is so designed as to be primarily useful for such purposes.

The evidence offered by the parties addressed, in part, whether certain objects introduced as exhibits contained features which either standing alone or taken together would permit one to conclude that the object's design rendered it primarily useful as a drug device in contrast with its other uses. Limiting the court's inquiry for the moment to marijuana and tetrahydrocannabinols, the evidence showed that there is a virtual universe of objects which are functionally usable for smoking marijuana or tetrahydrocannabinols. The evidence further suggested that within that universe there is one class of objects which may be considered as falling within the scope of the statute's operative phrase, consisting of pipes which are designed with a small bowl and screen for the placing and burning of the smoking substance. In such instances, the smoking substances may burn in less than a minute's time. One may reasonably infer that

such a bowl is designed for use with smoking substances which have an immediate and profound effect on the smoker in contrast with the customary pipe load of ordinary tobacco which is normally consumed over a period of at least several minutes in order for the smoker to achieve the degree of satisfaction sought. Moreover, such a small bowl is by its design particularly suited for use with a costly smoking substance such as marijuana or hashish which is often consumed in small quantities. Thus, although a pipe which has a small bowl and a screen is usable for smoking tobacco or any other legal organic smoking substance, one may nevertheless conclude that by its design it is primarily useful for smoking marijuana or tetrahydrocannabinols.

Even conceding, however, that there is a class of pipes which objectively fall within the paraphernalia statute's operative phrase, the statute nevertheless fails to furnish specifications or guidelines which may be used as a measure in determining whether a given object is primarily designed to be useful as a drug device. The difficulty created by this omission is illustrated by the court's reference in the preceding paragraph to a "small bowl." That phrase is a subjective characterization which has no fixed definition inasmuch as it is a product of individual perception, experience and, perhaps, motive. The point at which a "small bowl" becomes a "normal bowl" is a shadowy one at best.[7] Moreover, the evidence suggested that there are countless objects frequently thought of as devices used for smoking marijuana or tetrahydrocannabinols, but which are just as readily adaptable and functionally suitable for normal tobacco smoking or other legal uses. For example, the rolling papers in evidence are equally usable for tobacco and marijuana smoking regardless of whether the papers are plain white or whether they are embossed with a

[7] The same conclusion is suggested in *Music Shop, Inc.* v. *City of Ferndale*, No. 79-73375 (E.D. Mich. April 9, 1980), quoted *infra* at 10.

psychedelic or irreverent print design. The roach clips in evidence are virtually identical in design to the electrical alligator clips also introduced. The hemostats introduced into evidence have obvious non-drug related uses. Even the water pipes and bongs in evidence were shown to be readily usable for smoking tobacco or legal smoking herbs.[8] Likewise, the miniature spoons, small vials and pocket mirror in evidence all have apparent non-drug related uses in addition to their usefulness as aids in ingesting or inhaling cocaine.[9]

The chief mischief arising from the paraphernalia statute is found in the act element which, while focusing upon an object's primary design, fails to provide specifications or guidelines which may serve as a measure of primary design. Equally applicable here is the conclusion reached in *Music Shop, Inc.* v. *City of Ferndale*, No. 79-73375 (E.D. Mich. April 9, 1980), wherein the court observed with reference to another "primarily designed" paraphernalia statute that:

> Certainly no fixed extrinsic reference point appears to exist which could be relied upon to alert the potential retailer of ordinary intelligence and prudence, or provide a sliding scale for measurement of primary and secondary design intent.

Id. Thus, it is exceedingly difficult, if not impossible, to determine whether objects commonly considered to be used in conjunction with marijuana, tetrahydrocannabinols and cocaine fall within or without the statute's proscription based, as it is, on primary design. As a result, there is a substantial gray area in which it is simply not possible to apply the statute with adequate certainty to the morass of objects subject to its terms.

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[8] *See also Geiger* v. *City of Eagan*, No. 79-1831 (8th Cir., March 19, 1980).

[9] *See also Indiana Chapter, National Organization for the Reform of Marijuana Laws, Inc.* v. *Sendak*, No. Th 75-142-C (S.D. Ind., Feb. 14, 1980) (Final order) (Paper clip, the bar, hand mirror, spoon and aluminum foil recognized as objects useable as drug devices).

B.

In summary, it is clear from the evidence in this case that objects falling within the thirteen categories in the statute are as usable for smoking tobacco as for marijuana or hashish and are in reality used for both legitimate purposes.[10] Similarly, a cocaine spoon is equally usable for snorting snuff or spreading salt. And a vial, whether large or small, is but a vial. So, too, with numerous other items in evidence which are not specifically named among the thirteen categories, including cigarette rolling papers, hemostats and mirrors, all of which have long enjoyed respectability even though each may be employed in aid of an illicit drug use.

From the testimony of law enforcement officers appearing for both sides in this case, it is apparent that one's view as to the primary design of a given smoking device is frequently influenced by subjective matter such as the type of store in which the device is sold, the age of the buyer, and the use to which the object is being put. That is not to say that water pipes are used with the same frequency for smoking regular tobacco as for marijuana or hashish. Nor is it to suggest that an object can never be said to have been primarily designed for use as a drug device in the smoking of marijuana or hashish. Rather, as was conceded in argument, it is to hold that the primary design test is at best a slippery standard. In its application to most smoking devices, one is left to speculate as to whether the object's primary design or purpose is licit or illicit. The statute itself is devoid of any standards by which one might assess or measure a given object in order to determine the purpose for which it is primarily designed. Absent statutory standards the

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[10] Appearing as one of the thirteen categories is the strang sounding term "chillums." Webster's defines it as "The part of a water pipe that contains the substance (as tobacco or hashish) which is smoked." *Webster's New Collegiate Dictionary* 193 (rev. perm. ed. 1977)

primary design of the bulk of the smoking aids and devices embraced by the statute is generally not discernible with sufficient certainty as to enable one of ordinary intelligence to know whether a given item is primarily designed for use as a drug device. The citizen, then, is left at his peril to judge for himself. The law enforcement officer is encouraged, at his whim, to level arbitrary and discriminatory charges. The judge and jury are left to speculate in similar fashion.

C.

Although, as previously noted, a statute's incorporation of a *mens rea* element requiring a specific intent to perform the proscribed conduct can sometimes render certain an otherwise vague act element,[11] the knowledge element in the paraphernalia statute here is of no significant aid.

Subsection (b)(2) of the parapheralia statute requires that:

> The person knows or has reason to know that the design of such objects renders them primarily useful as drug devices.

W. Va. Code § 60A-4-403a(b)(2). It is observed that subsection (b)(2) is neither a specific intent nor even an actual knowledge requirement in that it permits a showing of constructive knowledge based upon proof of a "reason to know" to satisfyy the *mens rea* element. Assuming for the moment, however, that the phrase "or has reason to know" is deleted from subsection (b)(2),[12] the remaining actual knowledge requirement does not cure the fundamental vagueness of the statute inasmuch as the concept of primary design, for reasons just noted,

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[11] For a general discussion of *mens rea* see *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436-38 (1976).

[12] *See Record Revolution No. 6, Inc.* v. *City of Parma, infra* at 13.

is itself so vague as to be unworkable when applied to the bulk of the objects at issue under the statute.

D.

A further observation. During the course of the proceedings in this civil action, the paraphernalia statute was referred to on occasion by witnesses and counsel as based upon or otherwise modeled after the Model Drug Paraphernalia Act recently promulgated by the Drug Enforcement Administration of the United States Department of Justice. With the bare exception of the list of thirteen objects or classes of objects found in subsection (c) of the statute, however, the statute and Act bear virtually no resemblance. In *Record Revolution No. 6, Inc.* v. *City of Parma,* No. C80-38 (N.D. Ohio April 14, 1980), the portion of the Model Act, as adopted by the City of Parma, which prohibits the sale of drug paraphernalia was construed as being comprised of the following three elements:

(1) that the defendant delivered (sold) a piece of equipment, a product or material;

(2) that the defendant delivered (sold) the item (a) intending it for use with illegal narcotics, (b) having designed it himself for use with illegal narcotics, or (c) having intentionally used it himself with illegal narcotics; and

(3) that the defendant delivered (sold) the item with knowledge that it would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body an illegal controlled substance.

Id. at 16.

As is apparent, the Model Act as construed in *City of Parma* does not focus upon an object's primary design and the accused's knowledge of it. Instead, the *intent* of the accused with respect to an object delivered by him, coupled with his knowledge of the improper drug use

to be made of it, serve as the operative elements giving rise to the conduct proscribed by the Model Act.[13]

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[13] The court notes parenthetically that in *City of Parma* the court undertook a substantial construction of the Model Act in order to remedy constitutional deficiencies which the court perceived on the face of the Act. The deficiency which is, perhaps, most pertinent to the case at bar was that the Act makes it unlawful to distribute drug paraphernalia "knowing, or *under circumstances where one reasonably should know*" that it would be used in conjunction with a controlled substance. *Model Drug Paraphernalia Act* Art. II, § B (Emphasis added). The court stated that:

> Defining the offense of knowingly distributing drug paraphernalia in terms of the weakness of an individuals's ability to perceive rather than his criminal intent provides insufficient guidance to the distributors covered by this subsection and to those persons charged with the responsibility of enforcing it. The court further finds that the constructive knowledge standard is distinct from the other portions of this subsection and therefore severable from it pursuant to section 620.04(g), the severability clause.

Record Revolution No. 6, Inc. v. *City of Parma, supra* at 15-16. It should further be observed, however, that the 'knowing" element of the Model Act is dissimilar to the "knowing" element of the West Virginia paraphernalia statute in that the Model Act requires that the accused have knowledge of the object's end use whereas the paraphernalia statute requires that the accused have knowledge of the object's primary design.

A municipal drug paraphernalia ordinance which prohibited the sale of paraphernalia if the seller "has reasonable cause to believe that the product sold . . . will be used in conjunction with any controlled dangerous substance . . ." was declared void for vagueness in *Knoedler* v. *Roxbury Township*, No. 80-228 (D.N.J., March 3, 1980). The court held that the ordinance failed to provide sellers with guidance as to what factors could be considered in ascertaining the purchaser's "intent" in the absence of an admission by the purchaser, nor were such factors otherwise ascertainable by the court.

This construction of the Model Act is, therefore. similar in methodology to that employed in the National Prohibition Act cases in which the provisions of the Act in issue proscribed the sale or possession of otherwise innocuous items for the *intended use* of producing intoxicating lifuor. *See, e.g., Danovitz* v. *United States,* 281 U.S. 389 (1930); *Israel* v. *United States,* 63 F.2d 345 (3rd Cir. 1933); *Jones* v. *United States,* 11 F.2d 98 (4th Cir. 1926); *Weinstein* v. *United States,* 293 F. 388 (1st Cir. 1923).

In contrast, the paraphernalia statute focuses upon the accused's knowledge of an object's primary design, an elusive concept frequently impossible of application when related to the items falling within the ambit of the statute.

III.

The regulation of the sale of drug related devices is a matter well within the prerogative of the State. Society's concern with the increased incidence of drug abuse, and especially the serious threat which misuse of controlled substances poses to the young, is amply justified. Nevertheless, in legislating to meet this ominous menace, statutes must be drawn in keeping with constitutional standard of due process.

The imprecise means employed in the paraphernalia statute at issue create a constitutionally impermissible area of uncertainty which threatens to deter lawful conduct and promote arbitrary enforcement. Inasmuch as the paraphernalia statute fails to provide fair warning of what conduct is proscribed to those persons potentially affected by its terms and further fails to provide law enforcement officials with guidelines by which to enforce its sanctions, the court holds that the criminal offense delineated in W. Va. Code § 60A-4-403a(a)-(c) is unduly vague and void as violative of the requirements of due process. Since the remaining provisions of the paraphernalia statute, W. Va. Code § 60A-4-403a(d)-(g), are ancillary to and contingent upon the

statute's principal offense stated in subsections (a), (b) and (c), they too are unduly vague and void as violative of the requirements of due process.

Accordingly, it is hereby ORDERED and DECLARED pursuant to 28 U.S.C. § 2201 that W. Va. Code § 60A-4-403a(a)-(g) is void for vagueness and, therefore, violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

It is hereby forther ORDERED that defendants Mooney, Roark, Cummings, Knight and the defendant class shall be, and so hereby are, permanently enjoined from enforcing in any manner W. Va. Code § 60A-4-403(a)-(g).

The court's final disposition of this matter having rendered unnecessary plaintiffs' motion for a preliminary injunction, it is hereby further ORDERED that plaintiffs' motion for a preliminary injunction is denied as being moot.

The Clerk is directed to strike this civil action from the docket of the court and to forward certified copies of this order to all counsel of record herein.

ENTER: May 13, 1980

/s/ John T. Copenhaver, Jr.
John T. Copenhaver, Jr.
United States District Judge

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION MIDDLESEX COUNTY
DOCKET NO. C-2198-80

THE TOWN TOBACCONIST, et als.,

Plaintiffs,

v.

JOHN J. DEGNAN, Attorney General for the State of New Jersey,

Defendant.

Decided: March 12, 1981

COHEN, J. S.C.

This action was brought by a group of retailers of what they call novelty items for the purpose of challenging the constitutionality of Chapter 133 of the laws of 1980, an act regulating the manufacture, sale, possession, use and advertising of drug paraphernalia. They assert that some of their merchandise and sales activity may fall within the enforcement ambit of the act. They have a real and substantial fear of enforcement which gives them standing to bring this matter before the Court. They argue that major portions of the act are unconstitutional and ask for a permanent injunction against enforcement of those portions. I restrained enforcement of substantial parts of the new law and accelerated the matter for final hearing.

The plaintiffs do not say they are users of drug paraphernalia or possessors with intent to use drug paraphernalia in connection with controlled dangerous substances. They do not purport to represent such users or possessors or to occupy a position from which they can assert the rights of such users or possessors. Except as the determination of the rights of these plaintiffs may unavoidably spill over into other areas, therefore, the rights of such users and possessors are not before the Court. The plaintiffs also disclaim any interest in the enforcement of prohibitions against sale or possession of hypodermic syringes.

Drug paraphernalia is commonly and imprecisely thought of as items of equipment used in the storage, processing and use of controlled dangerous substances. The challenged law supplements the 1970 Controlled Dangerous Substances Act. It is patterned after a model act designed by the federal Drug Enforcement Administration. Variations of the model act have been adopted in a number of states and municipalities throughout the country. There has been a wide range of attacks on their constitutional validity and a variety of judicial responses.

The heart of our statute is the definition of drug paraphernalia. It is detailed and complex, probably because it tries to cover items of many different kinds. It attempts to treat items of but one use, and that one connected to CDS. It also reaches items usable and often used for such purposes but having other and innocent uses. Finally, it reaches items of commonly legitimate use that can also be employed in connection with CDS. The plaintiffs' major attack asserts that the definition is impermissibly vague and fatally overbroad. They make many other challenges to other elements of the statute. However, it makes sense first to examine what the plaintiff's argue is a central flaw in the statutory structure. If it is a defect as major as the plaintiffs suggest, it may require condemnation of the whole structure, without an inspection of the other claimed faults.

Before examining the definitional language, it is appropriate to ask whether the guidelines prepared by the attorney general have any role in such an examination. For a number of reasons, they do not. First, they do not purport to produce any relevant variance between the statutory definitional language as it is written and as the attorney general will permit it to be employed in enforcement activity. Second, even if the guidelines should be read to ameliorate any constitutional infirmities, they are neither a permanent part of the law nor an enforcement limitation whose continued existence manufacturers, wholesalers and retailers can rely upon

in making business commitments. Third, some parts of the guidelines may create their own equal protection problems, not contemplated by the legislature, which I would not readily engraft onto the law as written. The attorney general is chief law enforcement officer of the state and, within limits, he may regulate enforcement efforts throughout the state. And it is entirely appropriate that he should define, coordinate and control the enforcement activities of his subordinates. His reins on the activity of police officers and prosecutors can not, however, be taken to correct constitutional infirmities in statutory language.

An examination of the statutory definition must be made with the view toward the issue of vagueness and the additional issue of overbreadth. A statute may be so vague as to deprive affected persons of the due process of the law. A penal statute must afford persons of common intelligence fair notice of what the law requires of them and thus enable them to avoid prohibited conduct. It must provide explicit standards for those who enforce it. It must not delegate decisions on basic policy matters to enforcers and jurors on an *ad hoc* basis and thus create dangers of arbitrary and discriminatory application. *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

Even a perfectly clear statute may be unconstitutionally overbroad. If the targets of appropriate enforcement are surrounded by constitutionally protected areas, a law that attacks the protected areas in its efforts to reach its legitimate targets can be struck down as overbroad. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

The act defines drug paraphernalia as follows:

> As used in this act, "drug paraphernalia" means all equipment, products and materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, pro-

cessing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance in violation of the provisions of the act to which this act is a supplement. It shall include, but not be limited to: a. kits used or intended for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled dangerous substances or from which a controlled dangerous substance can be derived; b. kits used or intended for use in manufacturing, compounding, converting, producing, processing, or preparing controlled dangerous substances; c. isomerization devices used or intended for use in increasing the potency of any species of plant which is a controlled dangerous substance; d. testing equipment used or intended for use identifying, or in analyzing the strength, effectiveness or parity of controlled dangerous substances; e. scales and balances used or intended for use in weighing or measuring controlled dangerous substances; f. diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used or intended for use in cutting controlled dangerous substances; g. separation gins and sifters used or intended for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana; h. blenders, bowls, containers, spoons and mixing devices used or intended for use in compounding controlled dangerous substances; i. capsules, balloons, envelopes and other containers used or intended for use in packaging small quantities of controlled dangerous substances; j. containers and other objects used or intended for use in storing or concealing controlled dangerous substances; k. objects used or intended for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body, such as (1) metal, wooden, acrylic, glass, stone, plastic, or cer-

amic pipes with or without screens, permanent screens, hashish beads, or punctured metal bowls; (2) water pipes; (3) carbuertion tubes and devices; (4) smoking and carburetion masks; (5) roach clips, meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand; (6) miniature cocaine spoons, and cocaine vials; (7) chamber pipes; (8) carburetor pipes; (9) electric pipes; (10) air driven pipes; (11) chillums; (12) bongs; and (13) ice pipes or chillers.

In determining whether or not an object is drug paraphernalia, the trier of fact, in addition to or as part of the proofs, may consider the following factors: a. statements by an ower or by anyone in control of the object concerning its use; b. the proximity of the object to illegally possessed controlled dangerous substances; c. the existence of any residue of illegally possessed controlled dangerous substances on the object; d. direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows intend to use the object to facilitate a violation of this act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use as drug paraphernalia; e. instructions, oral or written, provided with the object concerning its use; f. descriptive materials accompanying the object which explain or depict its use: g. national or local advertising whose purpose the person knows or should know is to promote the sale of objects intended for use as drug paraphernalia; h. the manner in which the object is displayed for sale; i. the existence and scope of legitimate uses for the object in the community; and j. expert testimony concerning its use.

The first part of the definition says that it covers all materials or things "which are used or intended for

use" in various stages of growing, processing, storing or using unlawful CDS. There follows a long list of included examples. Description of each of the eleven examples or classes of examples includes the wording "used or intended for use" for a CDS-related purpose. The eleventh class, objects used or intended for use with marijuana, hashish and cocaine, is itself followed by thirteen examples. Since some of them are plainly multi-use items, the "used or intended for use" language that introduces them must be read to further qualify and define them. Thus, every material or thing must, in order to be drug paraphernalia, be used or intended for use in connection with unlawful CDS.

Objects are not used or intended for use in an unpopulated vacuum. The use or intention for use envisioned by the statute must be by someone. It is not facially clear whether "used" means frequently used or used by someone in particular against whom enforcement may be aimed and whether "intended for use" means intended by its manufacturer, its seller or its ultimate possessor for use. It is clear that it does not mean "designed for use". The model act created by D.E.A. employed the phrase, "used, intended for use, or designed for use". The omission in our act of that language may mean that it is insufficient that the original designer or maker of the item contemplated a particular use for the item.

It is not the seller's intent that is at issue. If it were, then an item would not be drug paraphernalia unless the retailer intended that his customer use it unlawfully. It is plain that the retailer's intent is to sell the item. The regulation of seller's conduct contained in Section 3 requires only that he "know" the item will be used by his customer with CDS. The legislature would not purposely have added so subtly and indirectly the greater requirement that he intended his customer to make such use.

After the list of examples, the act offers a list of ten factors which the trier of fact may consider as part of

the proofs or, startlingly, in addition thereto. The precise relevance of the listed factors is not indicated. In some cases it is not readily apparent.

The phrase "used or intended for use", that appears a dozen times renders the definition of drug paraphernalia unlawfully vague. It is impossible for any retailer to know whose use or whose intention he must be aware of. If it is 'frequent" use, he can not tell how frequent it must be, or among what groups of people. If it is the customer's intention, then, before the customer arrives, the retailer can not tell if he is unlawfully stocking drug paraphernalia. The prior act of putting the item on his shelves would become unlawful only later, after the intentions of the yet unidentified customer are revealed.

Section 3 of the act outlaws a retailer's possessing drug paraphernalia with intent to sell it, "knowing that it will be used" in connection with unlawful CDS. It is impossible to determine the lawfulness of the retailer's possession of multi-use items based on the prediction how many of tomorrow's customers will take items home and use them unlawfully. A retailer therefore can not decide whether to stock an item on the basis of its lawfulness, because its status as drug paraphernalia is not determinable until someone comes in to buy it.

The state argues that possession of items is often rendered unlawful by its connection with the intent of another. There are such laws. N.J.S.A. 2C:5-5 penalizes any person who possesses any tool "adapted, designed or commonly used" for committing forcible entries if he knows it is so adapted, designed or commonly used and has a purpose to provide it to some person who he knows has a purpose to so use it. N.J.S.A. 2C:29-3 penalizes a person who, with purpose to hinder the apprehension of another for an offense, provides a means of avoiding discovery or apprehension. N.J.S.A. 2C:37-7 penalizes a person who sells a gambling device, believing it is to be used in the advancement of unlawful gambling

activity. A gambling device is paraphernalia which is "used or usable in the playing phases of any gambling activity". N.J.S.A. 2C:37-1(e).

These statutes are different. In two instances, only knowing sale or provision for unlawful purposes is prohibited. Possession is not mentioned. In the third, the possessor of burglary tools is penalized for preparing to provide the means for a serious crime against a third person. In none of them does the statute attempt to prohibit possession of an item that has multiple uses solely on the basis of its later intended use by an unidentified person or group of persons.

An example may help. One of the statutory examples of drug paraphernalia is "containers . . . used or intended for use in storing . . . controlled dangerous substances". Any container of any shape or material or almost any size is included, if it is used or intended for storing CDS. Plastic sandwich bags may be and, I am told, frequently are so used. May a retailer other than a food store safely stock them? They are not designed for unlawful use or, in all likelihood, principally so used. But, a retailer whose customers are of a certain age or who stocks the trappings of youth may not confidently stock an item routinely sold in the supermarket down the street. There are probably other multipurpose items whose main use is in connection with CDS, and whose display and sale as multipurpose items may be more cynical. It may not be realistic to repeat loftily, as the plaintiff's witness did here, that one does not speculate what one's customers do with their purchases. That expressed an attitude best accompanied by a knowing wink. But the statutory definition does not distinguish between the ash tray, the baggie and the cigarettte rolling paper, all true multipurpose items, and others whose market is more narrowly focussed.

I must declare the definition unlawfully vague and, with it, the sections of the statute governing the plain-

tiffs' conduct, namely Sections 3, 4 and 5. The prohibitions of Section 3 are not saved by any requirement of specific intent. Intent to do what the law prohibits is insufficient if the central definition of the offending matter is unconstitutionally vague. *Screws* v. *United States*, 325 U.S. 91 (1945); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 (1952). Section 6 is unaffected by my ruling. Section 2 may or may not be affected. The question is not before me, but it is possible that the prohibition of use or possession of drug paraphernalia with intent to use it may survive Since the statutory definition can be read to focus on the use or intent of the very person to be charged under Section 2, his conduct may be lawfully regulated. That is not the plaintiffs' problem. It will have to await decision elsewhere.

I have reached my decision reluctantly. I have more than merely institutional sympathy for the legislature's legitimate desire to control unlawful CDS use by preventing casual, and open and ostensibly acceptable sale of its trappings. If the statutory definition were amenable to a saving construction, I would have adopted it. However, sympathy for the legislature's purpose and distaste for the trade it seeks to control can not validate an invalid penal statute.

The model act prepared by the DEA has created frequent constitutional controversy wherever enacted in whole or part. Various elements or all of it have been invalidated in *Record Revolution No. 6* v. *Parma*, Nos. 80-3308, 3352, 3353, (6 Cir. December 8, 1980); *Lazy J. Ltd.* v. *Borough of State College*, No. 80-1167 (M.D. Pa. 1981); *Norml* v. *Sendak*, No. TH 75-142-C (S.D. Ind. February 4, 1980); *Record Head, Inc.* v. *Olson*, 476 F. Supp. 366 (D.N.D. 1979); *Geiger* v. *City of Eigen*, 618 F.2d 26 (8 Cir. 1980); *Knoedler* v. *Roxbury Twp.*, 485 F. Supp. 990 (D.N.J. 1980); *Weiler* v. *Carpenter*, No. 80-637 J.B. (D.N.M. 1981); *Record Museum* v. *Lawrence Township*, 481 F. Supp. 768 (D.N.J. 1979). See, also, *High Ol' Times* v. *Busbee*, 456 F. Supp. 1035 (N.D. Ga.

1978); *Bambu Sales, Inc.* v. *Gibson,* 474 F. Supp. 1306 (D.N.J. 1979). These courts invalidated all or parts of the act and its progeny for various defects not all of which may inject our version. Running through their opinions, almost without exception, is the same feeling that business people of common intelligence can not deal sensibly with the act's definition or its requirement that they act on the invalid basis of a view of someone else's intent. They share this Court's reluctant conclusion that the constitution does not permit such vagueness and indirection in criminal laws. Compare *World Imports, Inc.* v. *Woodbridge Twp.,* 493 F. Supp. 428 (D.N.J. 1980); *Tobacco Road* v. *City of Nevi,* 490 F. Supp. 537 (E.D. Mich. 1979).

I share the belief expressed by Judge Sarokin in *Knoedler* v. *Roxbury Twp., Supra,* that a law barring sales of specified paraphernalia, with the purpose that the customer unlawfully use it with CDS, might pass constitutional muster.

Such formulation might avoid focusing on the seller's evaluation of his purchaser's intent. See *Knoedler* v. *Roxbury Twp., Supra.* The legislature might also consider whether some paraphernalia is used unlawfully with such frequency as to justify prohibition of commerce in it on a *per se* basis.

Plaintiffs will submit an order for judgment in accordance with this opinion and on notice to the Attorney General.

DISTRICT COURT,

CITY AND COUNTY OF DENVER, COLORADO
Case No. 81CV6293, Courtroom 21

REPORTER'S TRANSCRIPT—COURT RULING

DENNIS WAKABAYASHI, et al.,

Plaintiff,

vs.

DALE TOOLEY, et al.,

Defendant.

The hearing on preliminary injunction further commenced on Tuesday, August 18, 1981, before the HONORABLE ALVIN D. LICHTENSTEIN, Judge of the District Court, Second Judicial District.

FOR THE PLAINTIFF:
ARTHUR M. SCHWARTZ

FOR THE DEFENDANT:
DALE TOOLEY, District Attorney
By: SUSAN TROUT
GUY TILL
JACK OLSEN
Deputy District Attorneys

Denver, Colorado

Tuesday, August 18, 1981

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THE COURT: The Court is prepared to rule. Based on the testimony that I heard in this case, which would indicate to the Court a real question on the part of persons engaged in the sale of novelties, commonly referred to, I assume as "head shops", there apparently is a great deal of concern as to what constitutes or does not constitute a violation of 12-22-501, and subsequent sections relating to the control of drug paraphernalia.

The Court finds as a finding of fact that based on the testimony, there is a conscientious effort of not only the

owners themselves to make an accurate determination of what would constitute a violation of the law, and that also based on the evidence, physical evidence and testimony, apparently a law enforcement agency and prosecutors have attempted to enlighten the public in general; in certain segments of the public in particular, proprietors of novelty and head shops, as to what does nor does not constitute a violation of the law.

Taking into consideration all of the evidence before the Court, and have read thoroughly the fine briefs submitted by both parties in this case, and having done some reading and research on its own, the Court must address itself to the matter specifically before this Court on this day; that is, whether or not this Court which originally was requested to take this case for the purpose of a temporary restraining order, and by agreement of counsel, and with the approval of the Chief Judge, the jurisdiction of this Court was expected to ruling on a matter of preliminary injunction.

The elements that must be shown by a party seeking a preliminary injunction is one, that an irreparable harm would result were not the preliminary injunction granted; secondly, they must show a likelihood of prevailing on the merits, and in light of the fact that this is a utilization in part of the police powers of the State in controlling drug and drug trafficking as its ultimate goal, it is a matter of public interest, and there, last but not least, must be a balancing of equities between the parties, so that the Court must determine whether or not the status quo situation would result in the better administration of justice.

The evidence in this case has indicated that in an enforcement of the drug paraphernalia statute, arrests have already occurred within the City and County of Denver pursuant to the drug paraphernalia law, and I might state that inherent in the laws of our State is also the amendment adding drug paraphernalia to other itemized activities such as gambling, prostitution, etc.,

which could allow for the putting into effect of the public nuisance statute, which would, in effect, terminate the operation of the "public nuisance", and allow for the confiscation of certain properties.

The Courts finds as to the element of irreparable harm the past arrests and indication of possible future arrests, and the possible confiscation of property, and closing of businesses, could result in an irreparable harm, were not the enforcement of this statute at least preliminarily enjoined.

The Court must take judicial notice of the fact that one of the definite assets of an ongoing buisness is that it's "ongoing". And many business transactions result in the sale of "goodwill" because a business has been in existence for a period of time and is operating on a continuous basis. Closing down of all or any part of a business certainly would be a depivation of right to make a living, and as such could well cause an irreparable harm which could not be rectified solely by something like damages in the future because they are rather immeasurable in some, and how long it would take to regain momentum once it has been closed might result in the possibility if not probability of a business would not be able to continue at all, were on the merits this statute found to be unconstitutional.

Addressing another element, that of a matter of public interest, the Court recognizes very, very definitely the need to control drug trafficking thorughout the State, and in this case the injunction and suit on the merits is directed toward the Second Judicial District, the City and County of Denver, being a large metropolitan area, there is no question that drug trafficking has gotten out of line. It is a basis for many, many more serious felony-type crimes that are the direct result of drug trafficking and certainly this is a matter of public interest, and certainly subject to the police control powers of the State.

The Court must consider in determining whether or not to grant this preliminary injunction along with the other elements as to whether or not there is a likelihood of prevailing on the merits. Parenthetically, I would state that it makes somewhat easier a task of a trial judge in making a determination of likelihood of success, as opposed to that judge which must make the final determination of whether or not a statute is constitutional or not.

One of the main grounds raised by the plaintiff in this case is that this statute must of necessity fall because of vagueness. In the case of *People* v. *Heckard*, at 431 P.2d 1014, a 1967 case, our Supreme Court stated as follows:

> "Inherent in due process is the concept of fairness which requires the legislature to frame criminal statutes with sufficient clarity so as to inform persons subject to such laws of the standards of conduct imposed, i.e., give a fair warning of the forbidden acts.", citing *Cline* v. *Frink Dairy Company*, 274 U.S. 455, and *Memorial Trusts* v. *Beery*, 144 Colo. 448.

In the *Heckard* case, the Court goes on to say,

> "And, such laws must be drafted so that innocent persons who desire to comply with them will be able to do so. Of course, definiteness must also provide the police and prosecution with clearly-defined standards. These in turn serve to lessen the effect of personal judgment and discrimination upon enforcement processes. Obviously such statutes must provide standards sufficiently precise to inform a court and jury whether a crime has been committed and proved. When there is no reasonably ascertainable standard of guilt, the criminal process may lie open to whim and caprice which is abhorrent to our system of fair play and justice."

In reference to this case, and going back to what our Supreme Court has said, that the definiteness must provide police and prosecution with clearly-defined statutes, or standards, I note that the District Attorney's office in Denver in one of the Exhibits submitted to the Court and admitted, has sent out to all of the—I shouldn't say "all"—to some of the places of business which in his opinion might well be in violation of a statute, what in his opinion would enable them to continue in business by enumerating what, in his opinion, would be constitutionally and statutorily legal items for sale.

The Court notes that in these guidelines submitted to the operators of the novelty shops or head shops, is listed one item which in the opinion of Mr. Tooley, and it may well be in the opinion of most persons, an item which would definitely fall under, in his opinion, the drug paraphernalia statute. That, I believe, was what he referred to as a "coke kit", which comprised of a mirror, razor blade, and I believe a straw, and if I'm not mistaken it might have said something about "coke" on it.

Pointing out in the brief and also noting what in the guidelines that these items sold separately would not be a violation of the statute, but combined they would give notice to anyone that such an item was drug paraphernalia.

Court notes that this is really the only specific item that the Court recalls appearing in the guidelines which is set forth as drug paraphernalia, and the logic of the conclusion on the part of Mr. Tooley may be well shared by all courts throughout the State, all operators of novelty shops, because obviously such a combination—there would be no question as to whether or not it was primarily designed and intended for use as drug paraphernalia.

However, from the testimony that the Court heard from the witness stand, there are many, many, many items the use of which could be "primarily" tobacco,

smoking, various other means of smoking herbs which are not proscribed by statute, utilization of clips, electrical clips for holding—obviously intended originally for electrical wires, but could be used in clipping feathers to hat bands, various other utilization it would be difficult for a person other than subjectively to make a determination that any particular item fell under the proscription of this particular statute.

The statute itself in 12-22-503, states, "In determining whether an object is drug paraphernalia, a Court in its discretion may consider in addition to all other relevant factors the following." And then lists eleven criteria. The Court notes as pointed out in the briefs, that the model act allowed for these criteria or definitions to be utilized by law enforcement agencies and others including the court.

Our legislature saw fit to allow these criteria to be utilized solely by a court and in its discretion and in addition to other relevant factors. Obviously, this gives by virtue of the very words "in its discretion" the right of various courts throughout the State to construe subjectively on the same identical object involved its own subjective definition of whether or not, or conclusion of whether or not a particular object under a particular identical circumstance constituted drug paraphernalia as proscribed by the statute.

The 10th Circuit in a very tortured reasoning process read into its decision that the legislature by specifically leaving out law enforcement agencies and others, specifically meant to include it. I don't agree with the tortured reasoning of the 10th Circuit in that reagrd. And, fortunately, I'm not bound by their decision, although I do have the highest respect for our Federal courts, both at the District Court level, and at the Court of Appeals level. Fortunately, I am neither not bound nor am I persuaded by some of their tortured and illogical reasoning.

The question of intent was also raised in the statute because the statute does refer to intent in various sections. Referring in 12-22-502, subsection (2), the words "primarily adapted, designed, and intended for one or more of the following," listing four things such as, "To introduce into the human body any controlled substance under circumstances in violation of the laws of this state." Also appearing in the definition of the crime itself under 12-22-505 as it relates to this specific case:

> "Any person who sells or delivers, possesses with intent to sell or deliver, or manufactures with intent to sell or deliver equipment, products, or materials intending that such equipment, products, or materials will be used as drug paraphernalia."

By whom? That's the question the Court raises. By whom is this intent and by whom must it be used, and is the word "will be used" rather than "can be used" not important in the determination of whether or not one is violating the statute.

The Court has also considered the matter of the repeal of the former statute defining controlled substance as a dangerous drug and narcotic drug and the definitions as they appear in the controlled substance statute recently adopted by the legislature, and pursuant to the ruling in the *Arrington* case, 618 P.2d 744, citing *School District No. 1* v. *Hastings*, Court finds that in the drug paraphernalia statute there is a specific reference in 12-22-502, Subsection (1) as follows: " 'Controlled substance' means a narcotic drug, as defined in section 12-22-301 (16), or a dangerous drug as defined in section 12-22-403 (4)", which are no longer in existence. These are specific references to specific portions of specic statutes.

The Court does note, however, that there are definitions, general definitions, of controlled substances, and controlled narcotic substances in the new statute, but the ambiguity in the mind of someone attempting to conform with the law, even if he had these particular stat-

utes before him, as to whether or not he was bound by a repeal statute, or by a new statute redefining of these words, would leave certainly a great deal of vagueness and cause a lack of a due process of law which is essential in our justice system.

In *People* v. *the District Court*, 521 P.2d 1254, a 1974 case, our Supreme Court stated due process requires the statute to be sufficiently definite; to give notice of the proscribed conduct to one who wishes to avoid its penalties, and to guide the police, judge, jury, and counsel in its application. Further, where freedoms are potentially inhibited, the vagueness doctrine may require an especially demanding degree of specificity.

I think the right to pursuit of happiness, under the constitution of the United States, and the various provisions of our Colorado Constitution, require a freedom to earn a living legally within the confines of the State of Colorado. A determination of how one can earn a living legally, or how one would violate that proscription by earning a living illegally must be clear and definite in order to carry out the intent of both the United States and the Colorado Constitutions.

Under those circumstances, the Court feels that because those questions have been raised, and have raised serious questions in the mind of this Court as well as other questions which have been raised in counsel's for the plaintiffs brief as to the constitutionality of the statute, the Court feels that the plaintiff has met its burden of showing the likelihood of success in the trial on the merits.

Obviously, my ruling does not in any way make this statute unconstitutional. It merely retains a status quo so that an irreparable harm will not be done to the plaintiff during the interim that it will take for the trial court to whom the trial on the merits has been assigned to make its ultimate determination of the ultimate issue of fact of whether or not there is a lack of constitutionality

in violation of either the Colorado or the United States Constitution or both in this particular statute.

Last, but not least, it is incumbent upon this Court to balance the equities of the parties herein. The Court notes that for many, many, many years, the State of Colorado has successfully prospered and existed without a drug paraphernalia law being enforced, and I'm sure that the public interest of the People of the State of Colorado will not be so harmed within the next few months during the interim period prior to the final determination by the trial court of the merits of this case if this injunction were granted. Court feels that the status quo that must be preserved is the right of the people to make a living and the right of people to remain outside of our places of detention for violations of laws which may well be so vague as to be unconstitutional.

Under these circumstances, and based on what I have said previously, the Court is going to grant a preliminary injunction and refer this case back to the division from whence it came for final determination of this matter on its merits.

And further amplification or clarification needed?

MR. OLSON: People have nothing further.

MR. SCHWARTZ: Nothing, You Honor. Thank you.

THE COURT: Court will be in recess.

(Whereupon, the proceedings were concluded.)